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May 27 29

REPORTS OF CASES

-IN THE-

SUPREME COURT

-OF-

NEBRASKA:

1881-1882.

VOLUME XII.

BY

GUY A. BROWN,

OFFICIAL REPORTER.

OMAHA, NEB.:

HENRY GIBSON, LAW PUBLISHER.

1882.

Entered according to act of Congress in the office of the Librarian of Congress, A. D. 1882,

By GUY A. BROWN, REPORTER OF THE SUPREME COURT,

In behalf of the people of Nebraska.

Rec. Sept. 28, 1882

THE SUPREME COURT

OF

NEBRASKA.

CHIEF JUSTICE,

GEORGE B. LAKE.

JUDGES,

AMASA COBB,

SAMUEL MAXWELL.

ATTORNEY GENERAL,

C. J. DILWORTH.

CLERK AND REPORTER,

GUY A. BROWN.

DEPUTY,

HILAND H. WHEELER.

DISTRICT COURTS

OF

NEBRASKA.

JUDGES.

A. J. WEAVER,	-	-	-	-	FIRST DISTRICT.
S. B. POUND,	-	-	-	-	SECOND DISTRICT.
JAMES W. SAVAGE,	-	-	-	-	THIRD DISTRICT.
GEORGE W. POST,	-	-	-	-	FOURTH DISTRICT.
WILLIAM GASLIN, JR.,	-	-	-	-	FIFTH DISTRICT.
J. B. BARNES,	-	-	-	-	SIXTH DISTRICT.

DISTRICT ATTORNEYS.

W. H. MORRIS,	-	-	-	-	FIRST DISTRICT.
J. C. WATSON,	-	-	-	-	SECOND DISTRICT.
N. H. BURNHAM,	-	-	-	-	THIRD DISTRICT.
M. B. REESE,	-	-	-	-	FOURTH DISTRICT.
V. BIERBOWER,	-	-	-	-	FIFTH DISTRICT.
C. C. McNISH,	-	-	-	-	SIXTH DISTRICT.

SHORT-HAND REPORTERS.

P. E. BEARDSLEY,	-	-	-	-	FIRST DISTRICT.
OSCAR A. MULLON,	-	-	-	-	SECOND DISTRICT.
JOHN T. BELL,	-	-	-	-	THIRD DISTRICT.
E. M. BATTIS,	-	-	-	-	FOURTH DISTRICT.
F. M. HALLOWELL,	-	-	-	-	FIFTH DISTRICT.
EUGENE MOORE,	-	-	-	-	SIXTH DISTRICT.

The volume of laws quoted as the "Revised Statutes," or "Rev. Stat.," refers to the edition prepared in 1866, by E. ESTABROOK.

The volume of laws quoted as the "General Statutes," or "Gen. Stat.," refers to the edition prepared in 1873, by GUY A. BROWN.

Acts of various years are cited by a reference to the volume of laws of the year in which they were passed.

The volume of laws quoted as the "Compiled Statutes," or "Comp. Stat.," refers to the edition prepared in 1881, by GUY A. BROWN.

This volume contains a report of all decisions handed down prior to June 20, 1882, not previously reported. Opinions handed down at the adjourned term held on that date and at the July term, 1882, will appear in the next volume.

The syllabus of each case in this volume was prepared by the judge writing the opinion, in accordance with Rule XIV. All of the judges concurred in the opinions herein reported, except where specially noted.

Lincoln, June 20, 1882,

The following amendment to Rule VI was adopted at the January term, 1882.

RULE VI.

In the oral argument of a case the time allowed to each party shall not exceed one hour, unless for special reasons the court shall extend the time.

The following rule was adopted at the January term, 1882.

RULE XVIII.

In all cases of application to this court for a writ of mandamus, a reasonable notice must be given to the respondent of the time when it will be made, accompanied by a copy of the affidavit on which it is based, unless for special reasons it shall be otherwise ordered. And, except in urgent cases, the time of the hearing shall be during the week to which causes from the district in which the respondent resides are assigned.

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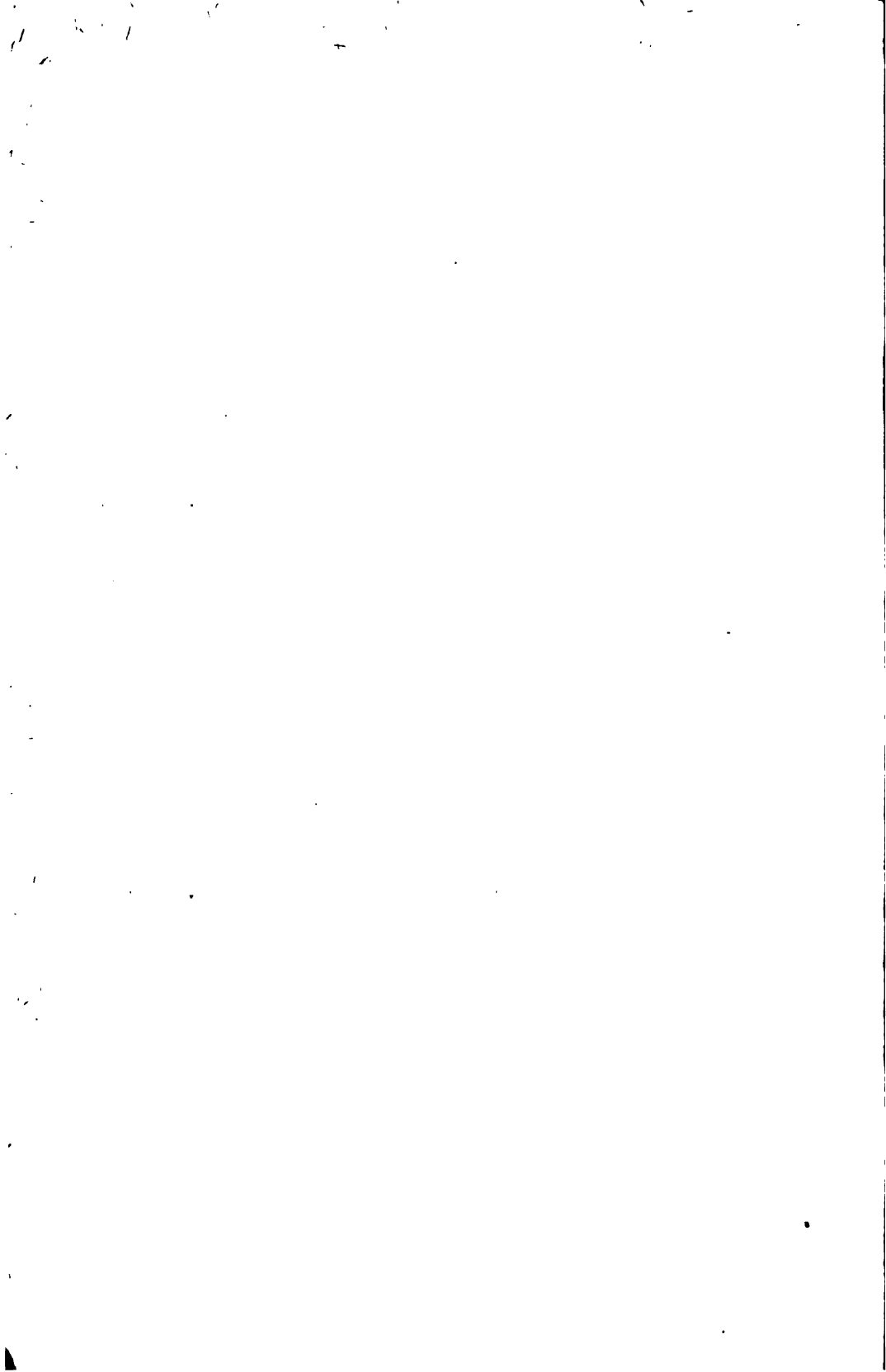
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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

NOVEMBER TERM, 1881.

12	1
12	488
12	1
37	250
12	1
54	423

PRESENT:

HON. SAMUEL MAXWELL, CHIEF JUSTICE.
" GEORGE B. LAKE, } JUDGES.
" AMASA COBB, }

ALMON H. WILSON, PLAINTIFF IN ERROR, v. L. J. BUMSTEAD, DEFENDANT IN ERROR.

Action for Death. An action for causing the death of a human being must be brought by the personal representatives of the deceased.

ERROR to the district court for Lancaster county. Tried below before POUND, J. The case is stated in the opinion.

Mason & Whedon, for plaintiff in error, cited *Pennsylvania Railroad v. Zebe*, 33 Penn. State, 318. *Sullivan v. U. P. Railroad*, 3 Dillon, 335. *Peck v. Mayor*, 3 Comstock, 489. Field on Damages. *Gilligan v. The New York*

Wilson v. Bumstead.

& *Harlem R. R.*, 1 E. D. Smith, 458. *Potter v. Chicago & Northwestern R. R.*, 21 Wis., 372.

W. J. Lamb, for defendant in error.

No action would lie at common law. Sedgwick on Damages, 644. The whole matter is regulated by statute. Comp. Stat., 211. *Railroad Co. v. Barron*, 5 Wall., 90. *Dickens v. New York Central*, 28 Barb., 41. *Pennsylvania Railroad v. Bantom*, 54 Penn. State, 495. *Taylor v. Western Pacific*, 45 Cal., 324. *Chicago & Rock Island v. Morris*, 26 Ill., 400. *C. C. & C. R. R. v. Crawford*, 24 Ohio State, 638.

MAXWELL, CH. J.

The plaintiff in his own name commenced an action in the district court of Lancaster county against the defendant to recover from him \$10,000.00 for the death of two of his children alleged to have been caused by the defendant who "so carelessly, negligently, ignorantly and unskilfully doctored and cared for said children; that by the ignorance, negligence and unskilfulness of said defendant, the said children were both killed, and died from the effects of the ignorance, carelessness, negligence and unskilfulness of said defendant, L. J. Bumstead," etc.

The defendant answered the petition and alleged, *First*. That the plaintiff is not now, nor was he at the commencement of the action next of kin to said deceased persons. *Second*. That there is a defect of parties plaintiff in this that the legal representatives of the deceased children are not made parties plaintiff, etc. The third defense it is unnecessary to notice.

The plaintiff demurred to the first and second counts of the answer. The demurrer was overruled and the plaintiff electing to stand on his demurrer the action was dismissed.

The question to be determined is, must an action of this kind be brought by the administrator, or may a father maintain an action in his own name for the death of his children?

Chapter 21 of the Comp. Stat., 211 is as follows:

Section 1. That whenever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company, or corporation, which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sec. 2. That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law, in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries, resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars; *Provided*, That every such action shall be commenced within two years after the death of such person.

At common law and independent of statutory provisions, an action for damages cannot be maintained for the death of a human being. There are a few cases decided in this country, notably that of *Sullivan v. Union Pacific R. R. Co.*, 8 Dillon, 385, where it is held that

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such an action can be maintained. But it is evident from an examination of the cases that such decisions are not derived from the common law.

Judge Cooley in his work on Torts, page 14, says: "In the vast majority of all the cases in which remedies are given for wrongs committed, the judge looks only to the common law, and must administer justice on principles which have grown up irrespective of statutes, and which, no matter how recently announced, are assumed to have existed from time immemorial." Again on page 15 of the same work it is said: "No action would lie at common law for causing the death of a human being. This was as thoroughly settled by decisions as it was possible for any point to be, and the concurrence of authority was unanimous."

In the application of the principles of the common law, where the precedents are unanimous in the support of a proposition, there is no safety but in a strict adherence to such precedents. If the court will not follow established rules, rights are sacrificed, and lawyers and litigants are left in doubt and uncertainty, while there is no certainty in regard to what, upon a given state of facts, the decision of the court will be. If the common law rule is inadequate, the proper course is by legislation, and such was the course pursued in this case. As no action would lie at common law, the remedy is entirely statutory, and the conditions, upon which the right to maintain the action rest, must be complied with. The second section provides that: "Every such action shall be brought by and in the names of the personal representatives of such deceased person." They are the only persons authorized to bring the action. The object doubtless was to prevent a multiplicity of suits in cases where the next of kin were numerous, and to make an equitable distribution of the amount recovered among all those entitled to the same.

But it is said that in any event the plaintiff is entitled

Scott v. Waldeck.

to recover his reasonable costs and expenses, incurred during the sickness of the children. This would be true in a proper case, but the object of this action is to recover for the death of the children, and not for costs and expenses. And there is no statement of facts in the petition, showing the amount of the same, or the defendant's liability therefor. The judgment of the court below is clearly right and is affirmed.

JUDGMENT AFFIRMED.

12	6
46	578
12	5
56	757

CYRUS V. SCOTT, PLAINTIFF IN ERROR, v. A. W. WALDECK,
DEFENDANT IN ERROR.

New Trial: SLEEPING JUROR. Where on the motion for a new trial one of the grounds assigned was, that a juror was asleep while one of the witnesses was testifying and one of the attorneys making his argument, and it not appearing that the attention of the court was called to the fact, *held*, that it was no ground for new trial.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

Batty & Ragan, for plaintiff in error.

Laird & Smith, for defendant in error.

MAXWELL, CH. J.

The petition alleges in substance, that in April 1878, Waldeck purchased a Jack from Scott, for the sum of \$175.00, \$75.00 being paid at the time of the purchase and a promissory note given for \$100.00, which Waldeck was afterwards compelled to pay; that said animal was warranted, etc., but was entirely worthless and of no value whatever. The answer admits the sale, but denies the warranty. On the trial of the cause, a verdict for the

The State v. Kearney County.

sum of \$150.00, was rendered in favor of Waldeck, upon which judgment was entered.

Two errors are assigned in this court: *First.* That the verdict is against the weight of evidence. *Second.* That a juror, one J. W. Coulter, was asleep while Scott was testifying, and also while one of the attorneys was making his argument to the jury.

As to the first objection, it is sufficient to say that, in our opinion, the evidence fully sustains the verdict, and the jury would not have been warranted in finding otherwise.

As to the second objection, it appears from the affidavit of one of the attorneys for Scott, that he makes the statement of said Coulter being asleep on the trial of said cause, from what affiant saw and knew of his own knowledge of the matter. This being the case, he should have called the attention of the court to the juror's condition; having failed to do so, he cannot afterwards complain. It is very clear that justice has been done in the case, and the judgment is affirmed.

JUDGMENT AFFIRMED.

12 6
18 381

THE STATE OF NEBRASKA, EX REL. JOHN H. ROE, v. THE COMMISSIONERS OF KEARNEY COUNTY AND THE COMMISSIONERS OF BUFFALO COUNTY.

1. **Bridges on county lines.** On application for a mandamus to compel the county commissioners of Buffalo and Kearney counties to repair the bridge across the Platte river between said counties south of Kearney city, *Held*, That the bridge being constructed by Buffalo county alone, Kearney county could not be compelled to aid in keeping it in repair.
2. ———: **DISCRETION OF COUNTY COMMISSIONERS.** Where there are not sufficient funds in the county treasury to repair all the bridges in a county, the court will not control the discretion of county commissioners as to what bridges they shall repair, unless there is a clear abuse of the trust.

The State v. Kearney County.

ORIGINAL application for mandamus.

Sam L. Savidge, for the relator, cited Laws 1879, 126-142. Comp. Stat., 442. *Jensen v. Supervisors of Polk County*, 47 Wis., 298.

T. M. Marquett and *Joel Hull*, for respondent.

The matter is discretionary with Kearney county. Laws 1879, 142. Comp. Stat., sec's 89-126, p. 450. High on Injunctions, 418. *State v. Freeholders of Essex*, 3 Zab., 214. *Hall v. County Commissioners*, 4 Gray, 414. *The Mayor v. Roberts*, 34 Ind., 379. Laws 1881, 329. *People v. Supervisors*, 47 Ill., 256.

MAXWELL, CH. J.

An alternative writ of mandamus was granted in this case, in which it is stated, in substance, that on the first day of January 1876, there was and still is a public highway through the city of Kearney, in Buffalo county, running directly south and across the Platte river into Kearney county, thence through said county to Bloomington, in Franklin county; that a part of said highway consists of a bridge across the Platte river at a point where the same divides said counties; and that said bridge is necessary for the convenience of the public; that from constant use it has become racked and worn, and unless the proper repairs are made thereon, the relator, with other citizens of said counties, will sustain great injury, etc.; that the county commissioners of said counties have been repeatedly requested to repair said bridge, but have refused to do so; that there are no funds available in the road districts of Kearney county; but that there is now in the county road fund of said county from the levies of the years previous to 1880 the sum of \$227.28, and that \$1,980.48 was levied in said county in the year 1880 for road purposes; that the road fund in Buffalo county derived from levies prior to 1880 is the sum of \$266.64,

and the levy for road purposes for 1880 is the sum of \$4,626.98, and that \$1,500.00 will repair said bridge.

The commissioners of Buffalo county have failed to answer. The commissioners of Kearney county in their answer allege, in substance, that the bridge in question was built exclusively by Buffalo county, and exclusively for its benefit and interest, and for the purpose of securing the trade and travel south and southwest of Buffalo county; that said bridge was not erected on a public road, but after its erection, in the year 1875, a special act of the legislature was passed, authorizing the location of a state road from Kearney to Bloomington; and that said road was so located at the expense of Buffalo county; that all the funds now levied in Kearney county, or in the treasury, are required to repair other bridges in said county.

A number of defenses are plead in the answer which it is unnecessary to notice. The case was referred to a referee to take testimony, and a large amount of testimony has been taken, from which it appears that all the funds under the control of the commissioners of Kearney county are required for other bridges.

Sec. 87 of the "act to amend Chap. 47 of the Revised Statutes of 1866," Laws of 1879, page 142 [Comp. Stat., 450] provides that: "Bridges over streams which divide counties, and bridges over streams on roads on county lines, shall be built and repaired at the equal expense of such counties; *Provided*, That for the building and maintaining of bridges, over streams near county lines, in which both are equally interested, the expense of building and maintaining any such bridges shall be borne equally by both counties."

Sec. 88 is as follows: "For the purpose of building or keeping in repair such bridge or bridges, it shall be lawful for the county boards of such adjoining counties to enter into joint contracts; and such contracts may be

Lomison v. Leach.

enforced in law or equity, against them jointly, the same as if entered into by individuals, and they may be proceeded against jointly, by any parties interested in such bridge or bridges, for any neglect of duty in reference to such bridge or bridges, or for any damages growing out of such neglect."

In 1881, section 88 was amended, limiting its application to bridges which have been built, or may hereafter be built by co-operation of two counties separated by a stream. Its provisions, therefore, do not apply to the bridge in question.

The county commissioners, within the limits fixed by the statute, have a discretion as to the expenditure of the road and bridge fund, and this discretion will not be controlled by the court, unless there is a clear abuse of the trust, which the testimony in this case fails to establish. A peremptory writ as to Kearney county is therefore denied, but as to Buffalo county, a peremptory writ for the amount of \$1,500.00 is awarded as prayed.

JUDGMENT ACCORDINGLY.

HENRY G. LOMISON, APPELLEE, v. THOMAS LEACH AND
JAMES I. GILMORE, APPELLANTS.

Fraud. One Leach purchased eighty acres of land from one Wallis, an agent of Lomison, for the sum of \$680.00, \$340.00 being paid in cash, and a note and mortgage being made for the residue. The mortgage was not recorded. Leach sold and conveyed to one Gilmore, subject to the mortgage. Gilmore commenced an action by attachment for taxes paid by him on the land. This attachment was levied on the note and mortgage in question, which were sold to Leach for the sum of \$26.00; *Held*, That the transaction was fraudulent and did not divest the title of Lomison to the note and mortgage.

Lomison v. Leach.

APPEAL from the district court for Gage county. Tried below before WEAVER, J. The opinion states the case.

Colby & Hazlett, for appellants.

Hale & Hardy and *M. L. Hayward*, for appellee.

MAXWELL, CH. J.

This is an action to foreclose a mortgage which was not recorded. 1st. The defendant Leach admits the execution of the mortgage, but denies each and every other allegation in the petition, and alleges that on the 15th day of July, 1878, he conveyed the mortgaged premises to James I. Gilmore, whose deed was filed for record in Gage county. 2nd. The defendants allege that on or about the 3d day of November, 1877, the plaintiff, by his agent, Thomas O. Wallis, sold the land in controversy to the defendant, Thomas Leach, for the sum of \$680.00, \$340.00 being paid in cash and \$340.00 being the note and mortgage in question; that said agent fraudulently represented to said defendant that there were over sixty acres of land under cultivation on said premises, when in fact there were but forty-two acres, as he well knew; and falsely and fraudulently represented to said defendant, for the purpose of inducing him to purchase said land, that the boundary line of said premises did not include a large amount of rough and untillable land, when in fact there were about twenty-five acres of rough and untillable land in said tract, as he well knew, which was of greatly inferior value, in consequence of which the defendant has sustained damages in the sum of \$450.00. 3d. That the defendant Gilmore, on the 19th day of August, 1878, recovered a judgment for the sum of \$10.60 and costs against Henry G. Lomison, the plaintiff herein, and thereafter, on the 20th day of August, 1878, an order of sale was issued on said judgment, commanding the officer to sell, as upon execution, the note and mortgage described

in plaintiff's petition, which, before that time, had been levied upon under an attachment in the action; that thereafter, upon the 14th day of September, 1878, said note and mortgage were sold to Thomas Leach for the sum of \$26.00, and the proceeds of said sale were applied in satisfaction of said judgment, costs and accrued costs, etc.

On the trial of the cause in the court below, the court found all the issues in favor of the plaintiff, and that there is due on said note and mortgage the sum of \$425.00 and allowed forty dollars as attorneys fees, and made an order that said premises be sold to satisfy the amount so found due. 2d. The court found that James I. Gilmore took said premises subject to the lien of said mortgage. The defendants appeal to this court.

It appears from the record that on or about the 9d day of November, 1877, one Thomas Wallis, as agent of the plaintiff, sold to Leach the north half of the northwest quarter of section 27, town 8 north, being 80 acres of land, about four miles south of the city of Beatrice, for the sum of \$680.00, \$340.00 being paid in cash, and a note for \$340.00 secured by mortgage on the premises being taken for the balance. This mortgage Wallis failed to have recorded, and soon after receiving the same seems to have left the state, the note and mortgage being left in his office, and afterwards came into possession of one McEwen. Leach, after receiving a deed of the premises, conveyed the same to Gilmore for the sum of \$1,000.00, deducting the amount of the mortgage debt from the purchase money. Gilmore thereupon commenced an action against Lomison before a justice of the peace to recover the sum of \$10.60 for taxes paid by him for Lomison "for the year 1877 on one hundred and sixty acres of land in Gage county." An order of attachment was issued in said action and the note and mortgage in question were levied upon and sold to Leach for

Lomison v. Leach.

the sum of \$26.00, and they are now in his possession. There is no pretence that Gilmore is an innocent purchaser of the mortgaged premises, as the proof shows that he purchased with full knowledge of the existence of the mortgage, and that it was unsatisfied. A transcript of the proceedings before the justice is set out in the record, together with copies of the affidavit for attachment and the bill of particulars, neither of which show any legal liability on the part of Lomison to Gilmore. The action was brought for taxes alleged to have been paid on a quarter section of land in Gage county, but there is no allegation of request on the part of Lomison to pay the same. It does clearly appear that Lomison is a non-resident of the state; that Leach has never seen him, and there is no testimony showing that Gilmore had ever seen him, or that he ever made any promise or request in any way to him, nor was the action founded on a covenant in a deed. There is such an absence of essential facts in the affidavit for the attachment, that it is very doubtful if the court thereby acquired jurisdiction, the proceedings being *ex parte*. But we do not place our decision upon that ground. The claim evidently has no legal existence, but was used as the merest pretext for the very purpose of enabling Leach to purchase the note and mortgage at a nominal price at the sale. And that he was privy to this scheme, if not its chief adviser, there is no doubt. This man who, under fraudulent proceedings in attachment, purchased his own note of \$340.00, secured by mortgage on real estate, for \$26.00, is not an innocent purchaser, and has no cause of complaint if the court refuses to sanction such fraudulent proceedings. The case lacks every element of honesty and fair dealing. In a proper case he would be entitled to be reimbursed the amount he was compelled to pay, but neither the pleadings nor proof entitle him to such judgment in this case.

 Godman v. Boggs.

As to the alleged damage sustained by Leach by reason of false representations made by Wallis, it is sufficient to say that the court below found that no damages had been sustained, and from the character of the testimony to sustain the same we think the finding is correct. The judgment of the district court is clearly right and is affirmed.

JUDGMENT AFFIRMED.

CHARLES C. GODMAN, PLAINTIFF IN ERROR, v. CHARLES T. BOGGS, RECEIVER, DEFENDANT IN ERROR.

12	13
15	381
15	382
23	742
12	13
62	245

Dormant Judgment: ISSUANCE OF EXECUTION. An execution issued by the clerk of a district court upon a transcript of a judgment of a justice of the peace or county judge and delivered to the sheriff, and by him levied upon real estate, and afterwards, before the sale, returned unsatisfied by order of the creditor in execution, will prevent the judgment becoming dormant.

ERROR to the district court of Lancaster county. Tried below, before POUND, J. The case is cited in the opinion.

Mason & Whedon, for plaintiff in error, cited *Hibbard v. Weil & Kahn*, 5 Neb., 41. *Shellenbarger v. Biser*, 5 Neb., 195. Code, sec. 38. *Seager v. Burns*, 4 Minn., 141. *Daily v. Litchfield*, 10 Mich., 29. *Agard v. Valencia*, 39 Cal., 292. *Crosby v. Davis*, 9 Iowa, 98.

Harwood & Ames, for defendant in error, cited *Kegg v. The State*, 10 Ohio, 75 and note. *Patton v. Sheriff*, 2 Ohio, 395. *Shuee v. Ferguson*, 3 Ohio, 136. *Benham v. Corwin*, 2 Ohio State, 36-43. *Kellogg v. Griffin*, 17 Johns, N. Y., 273. *Dickman v. Cook*, 17 Johns, N. Y., 332. *Rickards v. Cunningham*, 10 Neb., 417.

MAXWELL, CH. J.

Godman v. Boggs.

This is an action to enforce the specific performance of a contract for the sale of real estate. It is stated in the petition that Charles T. Boggs is the receiver of the Lincoln Building and Savings Association, and that on the 11th day of July, 1878, said association being the owner of lots 4, 5 and 6 in block 21, in the city of Lincoln, sold the same to Charles C. Godman, for the sum of \$2,335.50 to be paid as follows: \$535.50 on the 11th day of July, 1879, and upon said payment being made said Godman to receive from said corporation a warranty deed for said lots, and thereupon to execute three promissory notes as follows: one for six hundred dollars payable July 11th, 1880, one for six hundred dollars payable July 11th, 1881, and one for six hundred dollars payable July 11th, 1882, each bearing interest from date and secured by mortgage on said real estate. It is also stated that the plaintiff has tendered a warranty deed for said premises, which Godman has refused to receive.

To this petition Godman filed an answer in which he states in substance, that the lots in question were to be conveyed to him free from encumbrances upon the payment by him of the sum of \$535.50, on the 11th day of July, 1879, and the execution of the notes and mortgage set forth in the petition; that on the 5th day of May, 1873, one Chapin, who was the owner of said premises, executed a mortgage on said real estate to said Building and Savings Association to secure the payment of certain indebtedness, which mortgage on the 29th day of January, 1874, was duly recorded; that on the 2nd day of March, 1874, the North-Western Paper Company recovered a judgment before a justice of the peace against said Chapin, for the sum of \$59.85 and costs of said suit, and a transcript of said judgment was filed in the office of the clerk of the district court of Lancaster county, on the 11th day of August, 1874, and an execution duly issued thereon to the sheriff of said coun-

ty, which, on the 27th day of November, of that year, was returned wholly unsatisfied; that on the 21st day of July, 1874, one S. M. Boyd recovered in the probate court of said county a judgment against said Chapin, for the sum of \$121.00 and costs, and a transcript of the same was duly filed, etc., on the 12th day of October, of that year, and an execution was issued on said judgment, which, on the 7th day of December, 1874, was returned unsatisfied; that on the 8th day of September, 1879, another execution was issued on said judgment and levied on the real estate in controversy and was afterwards by the sheriff, in obedience to the order of the owner, returned into court wholly unsatisfied; that on the 8th day of September, 1874, W. T. Seaman recovered a judgment in the probate court of Lancaster county against said Chapin, for the sum of \$149.50 and costs, and a transcript of the same was duly filed, etc., and an execution was duly issued thereon on the 26th day of January, 1875, which was returned unsatisfied, and that afterwards, on the 12th day of July, 1879, another execution was issued on said judgment and levied on the premises in question and afterwards, in obedience to the directions of the owner thereof, was returned into court unsatisfied; that on the 20th day of April, 1875, the state of Nebraska recovered a judgment against said Chapin, in the district court of Lancaster county, for the sum of \$500.00 and costs; that all of said judgments are still in full force and effect; that on the 4th day of August, 1875, the said Association commenced an action of foreclosure against said Chapin on said mortgage, but neither said Boyd, Seaman nor the North-Western Paper Company were made defendants; that the state of Nebraska was made a defendant and service duly had upon the governor, but no appearance was made in the action, and judgment rendered against the state by default, and the state was declared to have no lien on said premises; that afterwards a decree of

Godman v. Boggs.

foreclosure was had and said premises sold under the decree and they were purchased by said Association, and that all the title possessed by said Association is derived from the sheriff's deed, etc.; that said several judgments are encumbrances on said premises, and on the 11th day of July, 1879, he tendered to said receiver the sum of \$535.50 with interest, according to the terms of said contract, and offered to comply with all the conditions of said contract on his part to be performed, and demanded a deed, etc., but said Association and said receiver refused to pay off said encumbrances and refused to convey said premises free from the same; that said Association is insolvent and nothing could be recovered on a breach of warranty of said deed. The answer also contains a denial of "each and every allegation in the petition contained not herein expressly admitted."

The plaintiff in the court below demurred to the answer upon the ground that the facts therein stated did not constitute a defense. The demurrer was sustained and judgment rendered in favor of the Association for the sum of \$1,550.00, and an order was made requiring Godman to accept the deed and execute the notes and mortgage as required by the contract, which he now assigns for error.

It is very clear from the record that Godman is entitled to a conveyance of the premises free from encumbrances. The question to be determined therefore is, whether or not the judgments in question are liens upon this real estate.

Sec. 477 of the Code of Civil Procedure provides that: "The lands and tenements of the debtor within the county where the judgment is entered, shall be bound for the satisfaction thereof, from the first day of the term at which the judgment is rendered; but judgments by confession, and judgments rendered at the same term at which the action is commenced, shall bind such lands only from the day on which such judgments are rendered.

All other lands, as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution."

Sec. 509 provides that: "No judgment heretofore rendered, or which hereafter may be rendered, on which execution shall not have been taken out and levied before the expiration of five years next after its rendition, shall operate as a lien upon the estate of any debtor, to the preference of any other bona fide judgment creditor; but in all cases where judgment has been or may be rendered in the supreme court, and a special mandate awarded to the district court to carry the same into execution, the lien of the judgment creditor shall continue for five years after the first day of the next term of the district court, to which such mandate may be directed," etc.

Sec. 482 provides that: "If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered in a court of record in this state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor."

Sec. 561 provides that: "In all cases in which judgment shall be rendered by a justice of the peace, the party in whose favor the judgment shall be rendered may file a transcript of such judgment in the office of the clerk of the district court of the county in which the judgment was rendered, and thereupon the clerk shall, on the day on which the same shall be filed, enter the case on the execution docket, together with the amount of the judgment and the time of filing the transcript."

Sec. 562 provides that: "Such judgment, if the transcript shall be filed in term time, shall have a lien on the real estate of the judgment debtor from the day of the

Godman v. Boggs.

filing; if filed in vacation, as against the judgment debtor, said judgment shall have a lien from the day of the filing, and as against subsequent judgment creditors from the first day of the next succeeding term, in the same manner, and to the same extent, as if the judgment had been rendered in the district court."

Sec. 563 provides that: "Execution may be issued thereon to the sheriff by the clerk of the court, in the same manner as if the judgment had been taken in court, and the sheriff shall execute and return the same as other executions; and in the case of sale of real estate, his proceedings shall be examined and approved by the court, as in other cases."

Sec. 482 is substantially a copy of Sec. 101 of Swans Ohio Statutes of 1841. See *Kelly v. Vincent*, 8 Ohio State 418. The proper construction of this section was before the supreme court of Ohio in the case cited. And it was there held that taking a writ of execution from the clerk's office, by the judgment creditor or his attorney, and returning the same to the clerk, without delivering to the sheriff, is not suing out an execution within the meaning of the statute. The reasons assigned are that an execution is the command of the court, addressed to the ministerial officer in writing, directing him to execute the judgment of the court. But when an execution is issued to an officer, the law requires him to levy upon the goods and chattels of the judgment debtor, which are not exempt by law, and it is only in cases where no goods and chattels can be found, that the officer is authorized to levy upon real estate. The executions in the cases set up in the answer appear to have been properly issued and delivered to the proper officer, and the fact that they were levied upon the premises in controversy, is sufficient to justify the presumption that no goods and chattels of the judgment debtor could be found whereon to levy, the presumption being that the officer

performed his duty in the premises. The execution being thus levied upon real estate, so heavily encumbered that nothing would in all probability be realized in satisfaction of the judgment by offering the same for sale, the creditor may order the execution returned and save unnecessary expense. In such case the execution has been sued out within the meaning of section 482, and the lien of the judgment is continued. If it is objected that the lien of a judgment could be continued thus indefinitely, it is sufficient to say that the lien could be thus continued by repeated revivals, and suing out under the statute has the same effect. The judgment in favor of the North-Western Paper Company appears to be dormant. There are not sufficient facts stated in the answer to enable us to determine whether the lien in favor of the state is still in force, but as to the other judgment liens set up in the answer, they are encumbrances upon said real estate. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

J. B. LININGER, PLAINTIFF IN ERROR, v. ISAAC M. RAYMOND
ET AL., DEFENDANTS IN ERROR.

1. **Assignment for the benefit of creditors.** Goods assigned for the benefit of creditors, and in the hands of the assignee, were attached at the suit of creditors of the assignors. The assignee in turn replevied them, and, on trial, the creditors justified the attachment on the ground that the assignment was fraudulent. Finding and judgment in favor of the creditors, from which the assignee prosecuted proceedings in error to this court. Evidence reviewed and held not to support the finding of the district court.
2. —: **ASSIGNEE.** After the sale of goods fairly made by an assignee, he may, if he sees fit, re-purchase them for his own private use and benefit.
3. —: **PREFERENCE BY DEBTOR IN FAILING CIRCUMSTANCES.** A debtor, even when in failing circumstances, has the right to pay the *bona fide* demand of one of his creditors to the exclusion of others.

12	19
15	535
22	504
12	19
30	131

12	19
40	827

12	19
43	322

12	19
45	140

12	19
50	419
50	489

 Lininger v. Raymond.

ERROR to the district court for Lancaster county. Tried below before POUND, J. The opinion states the case.

James E. Philpott and J. L. Caldwell, for plaintiff in error.

Assignment cannot be vacated by the defendants by showing that there was fraud or misrepresentation on the part of the debtor in the creation of the debt. *Horwitz v. Ellinger*, 31 Md., 492. *Mattison v. Damerest*, 4 Robt., 161. *Pearce v. Jackson*, 2 R. I., 35. *Reinhardt v. Bk. of Ky.*, 6 B. Mon., 252. *Kennedy v. Thorpe*, 51 N. Y., 174. S. C. 2nd Daily 258, 3 Abb. Pr. N. S. 131. *Waverly Bank v. Halsey*, 57 Barb., 249. Sale of goods and taking in payment therefor notes, if done in the ordinary course of business, is no badge of fraud. *Loeschiz v. Baldwin*, 38 N. Y., 326. Subsequent sales by assignee cannot re-vest property in debtor, or have a retroactive effect, so as to avoid the assignment. *Klapp v. Shirk*, 13 Penn. State, 589. *Shattuck v. Freeman*, 1 Met., 10. *Wooster v. Stanfield*, 11 Iowa, 128. *Baldwin v. Buckland*, 11 Mich., 389. *Cyaler v. McCurtry*, 40 N. Y., 221.

Harwood & Ames, for defendant in error.

If it appears that the object of the assignment was to delay creditors and effect a settlement, it is void. *Work v. Ellis*, 50 Barb. N. Y., 512.* *Keteltas v. Wilson*, 36 Barb., N. Y., 298. But the fraudulent intent of the assignors, accompanied by fraudulent disposition of their property, and the preference of a creditor on the eve of the assignment and in contemplation of it, render it void, although the assignee had been ignorant of both the fraud and preference. *Bump on Fraudulent Conveyances*, 361. 2 Perry on Trusts, § 590, note 2. *Moss v. Humphrey*, 4 Green. Ia., 448. *Fuller v. Ives*, 6 McLean, 478. *Waverly National Bank v. Halsey*, 57 Barb., 249.* *Ruble v.*

McDonald, 18 Iowa, 493.* *Schultz v. Hoagland*, N. Y. Com. Pleas, Feb. 1880, 9 Reporter, 355.* *Hubbard v. McNaughton*, Michigan, April, 1880, 5 N. W., Rep., 251.* *Flammigon v. Lampman*, 12 Mich., 58. Neither the assignee, nor the creditors of the assignors, are purchasers for a valuable consideration, and it is not necessary that knowledge of the fraud should be brought home. 2 Perry on Trusts, § 590, note 2. *Hairgrove v. Willington*, 8 Kans., 480.* *Johnson v. Laughlin*, 7 Kans., 359. And for that reason an assignee cannot maintain an action to set aside fraudulent conveyances made by the assignor. *Pillsbury v. Kenyon*, N. J. Chan., Oct. 1879, 9 Reporter, 517.

LAKE, J.

This action was brought to recover the possession of a stock of goods by the plaintiff as assignee. The defendants justified their detention as attaching creditors of the plaintiff's assignors, and the finding and judgment were in their favor. After a careful review of the case, and of the points made by counsel for the defendants, we find no ground upon which that judgment can be upheld.

Most of the questions now presented were before this court and decided in the case of *Lininger v. Raymond*, 9 Neb., 40, and will be treated as settled. The only new question deserving of any notice is whether upon the testimony *dehors* the deed of assignment itself, that instrument is shown to have been fraudulent. As to the assignee himself, there is not a syllable of evidence tending in the slightest degree to impeach his motives in accepting the trust confided to him, or to show any lack of the utmost good faith in all that he had done in its execution. Indeed, the defendants seem to have so much confidence in his integrity and truthfulness, as to make him their sole witness in the presentation of oral testimony as to his connection with the transaction, and his

statement stands uncontradicted, that he had no knowledge of the insolvency of the assignors, or that they contemplated making an assignment, until the evening before it was made, when he was requested to serve in the capacity of assignee.

In addition to the oral testimony of the assignee, the only evidence on which the defendants relied to establish fraud in the assignment, was an agreed statement of facts, to the admissibility of which both parties, by stipulation, were at liberty to object, and which the plaintiff did, to most thereof, on the ground of immateriality. To epitomize this statement of facts, in substance, it merely shows :

First, That some twenty days before the assignment, the assignors took "an inventory of the stock in trade, goods, wares and merchandise," which they then had on hand, which then amounted in value to about three thousand six hundred dollars. That, in addition to this stock, they had notes and accounts for goods sold to the nominal amount of three thousand three hundred dollars.

Second, That some eight days after taking this inventory, one of the assignors, for the purpose of obtaining credit, stated the facts of this inventory to the defendants, to whom the assignors were already indebted for a considerable amount, and thereby obtained a further credit of one hundred and one dollars and ninety-eight cents.

Third, That between the taking of the inventory and the date of the assignment, there was realized, by two of the assignors, by the sale and disposal of said goods for cash, and the notes of purchasers on thirty and sixty days time, and used for the use of their families, in all about eighteen hundred dollars; and during the same time they "received payment, partly in cash, but mostly in notes payable in thirty and sixty days from date, about twenty-four hundred dollars in amount of said

book accounts." Of these notes, "about ten hundred and fifty dollars in amount" were given to one Gillan. "in payment of a note for three hundred and fifty dollars and interest from May 1st, 1877, which he held against the assignors."

Fourth, "That a short time after said assignment the plaintiff, as assignee, sold all the goods, chattels and effects, * * * * after giving due notice thereof, and to the defendants, to the highest bidder, at public auction, for the sum of about nine hundred dollars, and immediately thereafter purchased the same of the purchaser at said sale, and has since continued in the possession of the same, and conducted and carried on a business similar to that formerly carried on by said co-partnership, in all respects as his own, and in the same building formerly used and occupied by said co-partnership in said business."

Fifth, That on the 6th of March, 1878, the plaintiff sent to the defendants and other creditors a statement of the effects and liabilities of his assignors, together with an offer of twenty-two cents on the dollar of their indebtedness as a compromise, and to save the expense and sacrifice incident to a forced sale of the goods at auction.

Sixth, That the defendants commenced their action in attachment on the 31st of January, 1878, and attached the goods in controversy on the ground that the assignors had "fraudulently contracted the debt and incurred the obligation on which the suit was brought," and on the further grounds that they had "assigned, removed or disposed of, or were about to dispose of, their property, or a part thereof, with intent to defraud their creditors," and that "they had property or rights in action which they concealed."

To this attachment suit no defense appears to have been made, and at the May term of said court, 1878, the defendants recovered a judgment for eight hundred and

forty dollars and costs, and an order for the sale of attached property, which, however, had been reclaimed by the assignee by virtue of said replevin proceedings.

The foregoing is the substance of all the facts upon which the district court rendered its judgment in favor of the defendants, and we hold them to be totally inadequate to support it. There is not a single fact shown that is not entirely consistent with good faith on the part of both the assignors and the assignee in making the assignment. Considerable stress is put upon the fact of the assignee finally becoming possessed, in his individual right, of the goods, but there is nothing even suspicious in this circumstance, when viewed in the light of the statement agreed to concerning it, that the goods were first duly sold by the assignee to the highest bidder, after due notice, not only to the public generally, but also to the defendants, specially. There is not a word impeaching, in the slightest degree, the fairness of the assignee's sale, nor as to the price which he finally paid to obtain the goods from the purchaser. The sale by the assignee having been fairly made, which is in effect conceded, there was no rule of law preventing him from re-purchasing either a part or the whole of the goods for his own private use and benefit, if he desired to do so, and with as much freedom as might an entire stranger. We are of opinion that this fact of re-purchase of the goods by the assignee was entirely immaterial, for it certainly had no tendency to show that the assignment itself was fraudulently made.

Reliance is also placed upon the fact of the discrepancy between the value of the effects, as shown by the inventory of January 9th, and their value at the date of the assignment. The fact of a discrepancy, without any explanation, is of very little, if any, importance upon the question at issue. There is nothing to show upon what basis the respective valuations were made, or the quantity

Rosenfield v. Chada.

of goods that had been disposed of, during the interval between them. Indeed, there is nothing in any of the conceded facts to show that a single article of the stock had been devoted by the assignors to an unlawful or fraudulent purpose. The payment of the Gillan note by notes taken by the assignors in settlement of accounts, for aught that appears, was entirely justifiable. A debtor, even when in failing circumstances, has the right to pay the *bona fide* demand of one of his creditors to the exclusion of others. This is a right of which the law has not undertaken to deprive him. As to the man Gillan, there is nothing showing him in any other relation to the assignors than that of creditor to debtors, and the seemingly great disproportion between the nominal value of the notes with which payment was made and that of the note paid, is of no significance without some evidence of the responsibility of the makers.

Being clearly of opinion that the finding of the court is entirely unsupported by the evidence, the judgment must be reversed and a new trial awarded.

REVERSED AND REMANDED.

JOSEPH ROSENFELD AND MAYER ROSENFELD, APPELLANTS,
v. MATHIAS CHADA, APPELLEE.

1. **Equity Pleading.** When a petition in equity, filed by judgment creditors of the defendant to subject his "interest" in certain real estate to the payment of the judgment, fails to show that such interest is merely equitable, or so clouded by apparent but really fraudulent and unreal claims, as would render the title of a purchaser at execution sale uncertain, no case for equitable cognizance is presented, and the action will be dismissed.
2. —: **EQUITABLE INTEREST IN LAND COUPLED WITH THE ACTUAL POSSESSION.** An equitable interest in land, coupled with the actual possession, may be reached by a seizure and sale under an ordinary execution at law.

12	25
18	649
12	25
25	739
12	25
36	754
12	25
43	79

APPEAL from Saline county. Tried below before WEAVER, J.

M. B. C. True, for appellants.

W. H. Morris, for appellee.

LAKE, J.

This case, which nominally is one seeking equitable relief, comes here by appeal. It was submitted to the court below on the pleadings alone, and having been determined adversely to the plaintiff, he brings the case to this court for review, and the question we first meet is, whether the petition states a cause of action.

The petition charges that on the 20th day of April, 1880, the plaintiff recovered a judgment in the district court against the defendant for \$225.50 debt, and costs, taxed at \$89.83, inclusive of an attorney's fee, on which has been paid the sum of \$62, leaving the residue of said judgment still wholly unsatisfied. That an execution has been duly issued thereon and returned by the sheriff, "that after diligent search he was unable to find any property of the said defendant on which he could levy."

These averments, which show the plaintiffs in the character of judgment creditors of the defendant, are followed by the further allegation that under a written agreement, executed by one Samuel Long to the defendant, he has an "interest" in lot eleven, block one hundred and forty-three, in the city of Crete, to the amount of "about three hundred dollars;" "that under said contract defendant took immediate possession of said premises and has remained in possession ever since;" and that the defendant, who is insolvent, "wrongfully refuses to apply his said interest, or any part thereof, in said premises, to the payment of said judgment of the said plaintiffs." The particular prayer is for a sale of

said interest and the application of the proceeds to the satisfaction of the judgment, followed by one for general relief.

Admitting the truth of all of these allegations, which, indeed, include the whole substance of the charging part of the petition, still we fail to discover any ground for bringing the defendant into a court of equity, or on which to base an equitable decree. No fraud respecting said lot is alleged against the defendant, but his interest therein, for aught that appears, may be reached by a seizure and sale under an ordinary execution. If this interest were shown to be indefinite in its character or extent, or so clouded by apparent but really fraudulent or unreal adverse claims as would render the title of a purchaser at execution sale uncertain, a case for equitable cognizance would be presented. But nothing of this sort appears. The defendant's interest in the lot was derived through "a certain agreement for sale, executed by Samuel Long, the then owner thereof." The terms of said agreement are not given, consequently we have no means of knowing whether this "interest" is of a legal or merely equitable nature, but even conceding it to be the latter, still, as it is coupled with an absolute possession by the defendant, an ordinary execution is ample to reach it.

No ground for equitable relief being shown, the petition fails to state a cause of action, and the judgment of the court below, dismissing the case, must be affirmed.

JUDGMENT AFFIRMED.

12 28
15 310
19 28
27 504

SARAH ROGERS, PLAINTIFF IN ERROR, v. WALSH & PUTNAM,
DEFENDANTS IN ERROR.

Void County Warrants: CONSIDERATION. The plaintiff bought of the defendants what she supposed were, and what purported to be, the warrants of York county, but which having been issued by the county commissioners of that county, without authority of law, were void and of no value. Action to recover the price paid. *Held*, That the pretended warrants were not a valid consideration for the money paid therefor, and that the plaintiff was entitled to recover it back.

ERROR to the district court for Lancaster county. Heard there before POUND, J., on demurrer to the petition. Demurrer sustained and cause dismissed.

W. J. Lamb, for plaintiff in error, cited *School District v. Stough*, 4 Neb., 359. Benjamin on Sales, secs. 607, 608, 609. *Thrall v. Newell*, 19 Vermont, 203. *Terry v. Bissell*, 26 Conn., 40. *Flynn v. Allen*, 57 Penn. State, 482. *Lobdell v. Baker*, 3 Met., 469. *Ellis v. Grooms*, 1 Stewart, (Ala.) 47. *Cardin v. Boyd*, 11 Heisk., 176. *Howell v. Wilson*, 2 Blackf., 419. *Turner v. Tuttle*, 1 Root, 350. *Bank v. Dodge*, 8 Barb., 233. *Boyd v. Anderson*, 1 Overton, 446. *Hurd v. Hall*, 12 Wis., 136. *Fitzgerald v. Plattsmouth*, 10 Neb., 401.

Mason & Whedon, for defendants in error, cited *Lambert v. Heath*, 15 M. & W., 486. *Otis v. Cullum*, 2 Otto, 447. *Loan Association v. Topeka*, 20 Wall., 665. *Charter v. Hopkins*, 4 M. & W., 399. Most of the cases cited by the plaintiff relate to forged paper. They rest on a different principle than the one at bar. In those cases, the purchasers did not get what they intended to buy, and did buy. They got forged paper, and not true and genuine. In the case at bar the plaintiff in error got exactly what she intended to buy and did buy. The commissioners record of York county, in respect to these warrants, was

open for her inspection and examination, and it was a question of law whether these warrants were *ultra vires* and not of fact, and it is too well established that money paid under a mistake of law cannot be recovered back, to need citation of authorities in this court for its support. Here was no bad faith, no liability *ex delicto*, no claim or pretense of that kind. And here is a full performance of everything that the law implies *ex contractu*, that the warrants belonged to the defendants in error, that they were not forgeries. It is admitted that the warrants sold were not forgeries, it is admitted that they belonged to Walsh & Putnam, that there was no warranty or guaranty. There was no express stipulation, there was no liability beyond the implied guaranty that Walsh & Putnam were the owners of these warrants, and where there is no express stipulation there is no liability.

LAKE, J.

The warrants in question having been issued by the commissioners of York county without authority of law, were void. We have presented to us, therefore, the single question, whether, under the circumstances of their sale, they were a good consideration for the money which the plaintiff paid for them.

It is averred in the petition that at the time of this purchase, and the payment of the money, there were genuine valid county warrants in the market where these were bought, and that the plaintiff supposed those in question to be such, until long after she received them. Indeed, from the facts alleged, there can be no doubt that the purchase was made with the full belief on her part, and probably on the part of the defendants, that what was obtained by it were the genuine warrants of York county. Such being the case, but for the seeming confidence of the defendants' counsel in the strength of their position, we would not suppose a doubt could

have existed that there was an entire want of consideration for the payment of the money, and that the plaintiff was entitled to a return of the price paid for what had proved to be wholly worthless.

The defense here made rests chiefly upon the authority of two cases cited, one English and the other American, viz. *Lambert v. Heath*, 15 M. & W., 484, and *Otis v. Cullum*, 2 Otto, 447. But the facts of those cases were so different in character from those of the one at bar, that the governing principle in them is inapplicable here. In those cases the purchasers actually obtained just what they had contracted to buy, and the decisions were put upon that ground alone, there being no express warranty. Here, however, the purchase was of the warrants of York county, while in fact what were received as such were not the warrants of that county at all, but only things in their similitude. Having been issued by the commissioners without authority of law, they can no more be considered the obligations of that county, than if signed by any other of her citizens. They are merely valueless pieces of paper, resembling York county warrants, nothing more.

The principle that should govern here, was applied in the case of *Young v. Cole*, reported in 32 Eng. Com. Law, 334, and cited in Benj. on Sales, Sec. 607. The sale there considered was of certain Guatemala bonds, which, because unstamped, had been repudiated by the government of that state, and were therefore valueless, of which facts both seller and purchaser were at the time ignorant, and it was held that the defendant should restore the price he had received. In commenting upon the facts of that case Tindal, C. J., said, that the contract was for real Guatemala bonds, and the question was not one of warranty, but whether the defendant had not delivered something which, though resembling the article contracted to be sold, was of no value.

On the facts alleged in the petition we are of opinion

The State v. Harvey.

that the pretended warrants were not a valid consideration for the price paid therefor, and that the plaintiff should recover. The judgment is therefore reversed, and the cause remanded to the court below for further proceedings.

REVERSED AND REMANDED.

THE STATE OF NEBRASKA, EX REL. HENRY E. HITCHCOCK,
v. A. E. HARVEY, COUNTY TREASURER.

Taxes: COUNTY WARRANTS: PAYMENT OF. Sec. 25, Ch. 18, Comp. Statutes requires the usual levy of taxes for county purposes to be made upon an estimate prepared by the board of county commissioners. Such estimate may, if necessary, include outstanding warrants of preceding years; but where it does not, the fund arising from the levy of that year cannot be legally used to pay the warrants of preceding years, at least until all of the expenditures contemplated by the yearly estimate have been met.

THIS was an original application for a mandamus to compel the respondent, as county treasurer of Furnas county, to pay a registered warrant of that county for the year 1879, without preferring the warrants of 1880 to the warrants of 1879, previously registered, in disbursing the revenue of the year 1880, collected by him.

J. R. Webster, for the relator, contended that warrants must be paid in the order of registration, without regard to the year in which the levy is made. Comp. Stat., Chap. 93. The act of 1879 [Comp. Stat., Chap. 18, Sec. 31, et seq.] does not repeal the registration act, which is still in full force, and should be observed by the relator.

A. E. Harvey, pro se.

LAKE, J.

The State v. Harvey.

An examination of the several provisions of statute, bearing upon the question here raised, has brought us to the conclusion that the respondent's position is well taken, and that the writ must be withheld.

The sections of the statute specially applicable, and by which we are brought to this result, are the 25th and 34th of Chap. 18, Comp. Statutes. By the *sixth* subdivision of sec. 25 it is made the duty of the board of county commissioners "at their regular meeting in January of each year, to prepare an estimate of the necessary expenses of the county during the ensuing year, the total of which shall in no instance exceed the amount of taxes authorized by law to be levied during that year, including the amounts necessary to meet outstanding indebtedness as evidenced by bonds, coupons or warrants legally issued; and such estimate containing the items constituting the amounts shall be entered at large upon their records and published four successive weeks before the levy for that year, in some newspaper published and of general circulation in the county, or, if none is published, then in some newspaper of general circulation therein, *and no levy of taxes shall be made for any other purpose or amounts than are specified in such estimate as published*, but any item or amount may be stricken from such estimate or reduced at the time the levy is made," etc.

And the first clause of sec. 34 provides that "it shall not be lawful for any warrant to be issued for any amount exceeding in the aggregate 75 per cent. of the amount levied by tax for the current year, except there be money in the treasury to the credit of the proper fund for the payment of the same."

In these provisions we see that the commissioners are required to distinctly specify the very purposes for which they levy taxes for each current year. And one of the purposes which they are authorized to consider and levy

for is the outstanding indebtedness of the county, evidenced by its warrants legally issued in former years. The warrant in question was issued July 8th, 1879, and against the levy for that year, *but it is not shown that the indebtedness it evidenced entered into the estimate for the levy of 1880, out of which the relator seeks to have it paid.* Nor does it even appear that there was any reason why it should have been a part of that estimate, ample provision already having been made by the levy of 1879, the year in which it was drawn, as shown by the unexpended balance indorsed on the warrant itself.

Now, the law requiring an itemized estimate to be made of the requisite amounts to be raised by taxation for county purposes, is it not a reasonable inference, from this fact alone, that the legislative intent was that the funds realized from the levy should be devoted to those purposes? It certainly could not have been intended that objects thus provided for should be postponed to such as were not included in the yearly estimate.

That the levy for each year is to be regarded as a distinct fund, at least until all of the expenditures contemplated by the yearly estimate have been met, is further shown, we think, by the provision above quoted, which limits the issue of warrants to 75 per cent. of the current levy, unless "there be money in the treasury to the credit of the proper fund for the payment of the same." But the question here arises, what is the "proper fund" to which this provision refers? We answer that it can be no other than the one raised to meet an estimated expenditure covering the particular indebtedness which the warrant represents. If this be not so, what would be the condition of a county financially, after 75 per cent. of the levy had been anticipated by warrants issued in advance of the collection, if the money belonging to that fund should be used as fast as collected in paying the outstanding warrants of preceding years? Is it not appar-

The State v. Harvey.

ent that, in such case, there would be no means at hand for defraying the very expenses which the commissioners in their yearly estimate and tax levy pursuant to statute had expressly provided for? And such might be the result to Furnas county if the amount of her outstanding warrants be large, should the rule of payment contended for by the relator prevail.

Another provision of law also tending strongly to show that the money realized from the levy of any one year was intended to be a distinct fund for the payment, first, of the estimated expenses of that year, is sec. 35 of the above-mentioned chapter, which requires that: "Each warrant shall specify the amount levied and appropriated to the fund upon which it is drawn, and the amount already expended of such fund." One of the effects of a compliance with this section is to make each warrant show the condition of the particular fund when it was drawn, provided no payments have been made from it but of warrants of the current year. And this, doubtless, was one of the objects of the provision. But if the treasurer were to pay from it the warrants of other years, drawn against other levies, the fund might, in fact, be actually exhausted, while the last warrant drawn would indicate that a considerable balance of the levy for the current year was still unexpended and available. For these reasons the writ must be denied.

WRIT DENIED.

IRE D. NEIHARDT AND C. J. NEIHARDT, PLAINTIFFS IN ERROR,
V. HENRY A. KILMER, DEFENDANT IN ERROR.

1. Jurisdiction of justice of peace. A justice of the peace has jurisdiction of an action for the taking and converting of personal chattels of the value of two hundred dollars or under, and is not ousted of such jurisdiction by pleading and proof that defendant took such chattels by virtue of an execution, he being a sheriff.
2. Instructions to jury. However good abstract law may be contained in an instruction prayed for, it is not error in the court to refuse to give it, unless it is applicable to the testimony in the case.
3. ———. When proper and sufficient instructions have been presented by the parties to an action and given to the jury, other instructions on the judge's own motion are quite superfluous and unnecessary.

ERROR to the district court for Seward county. Tried below before Post, J. The action was originally brought by Kilmer against I. D. Neihardt and C. J. Neihardt for the conversion of a corn planter, corn cultivator and a cow, which the latter had levied upon and sold as sheriff and deputy sheriff to satisfy an execution issued on a judgment against Kilmer. The execution sale took place on the 27th of December, 1875. On the 20th day of December Kilmer filed an inventory of all his personal property, claiming the same as exempt under sec. 521 of the code, he being the head of a family and owning no homestead. Appraisers were called and property appraised, and \$500 worth set off to Kilmer. Afterwards, on the 27th day of December, the day of sale, the first above described property was claimed by Kilmer as specifically exempt under sec. 530 of the code, in addition to the \$500 worth of property appraised and set out to him on the 20th day of December. Kilmer had judgment before the justice and also in the district court on appeal. The defendants before the justice moved to dismiss for want of jurisdiction, and in the district court pleaded want of jurisdiction in the justice, and being de-

12	36
17	164
18	98
19	844
19	619
19	35
30	728
19	35
47	55

Nelhardt v. Kilmer.

feated on these points, came here upon a petition in error, alleging the same, with other matters stated in the opinion, as error, which should cause a reversal of the judgment against them.

George B. France, for plaintiffs in error.

The justice had no jurisdiction. If property was exempt, plaintiffs in error, as officers, committed trespass, and that trespass was not the act of mere individuals, but was done *virtute officii*, and was official misconduct in office. *Ohio v. Jennings*, 4 Ohio State, 419. *People v. Schuyler*, 4 N. Y., 173. *Neal v. Killee*, 12 Kan., 247. Cooley on Torts, 395. *Miller v. Roby*, 9 Neb., 471. *Archer v. Noble*, 3 Maine, 418. *Harris v. Hensen*, 11 Maine, 241. If justice had no jurisdiction, then the district court on appeal acquired none. *Nichol v. Patterson*, 4 Ohio, 200. *Glover v. Moses*, 13 Ohio, 322. *Wood v. O'Ferrall*, 19 Ohio State, 427.

Leese & Lewis, for defendant in error.

If specific exempt property be wrongfully taken by virtue of legal process, has the injured party any remedy except by suit in the district court for misconduct in office? We claim that there are two remedies against the officer. *First*, Replevin. Laws 1877, p. 10. Thompson on Homesteads, 876. *Second*, Trespass. Maxwell's Justice, 99. Freeman on Executions, 202, 215, 216. Field on Damages, 687, 772, 786. *Miller v. Roby*, 9 Neb., 472. 2 Hill on Torts, 112, 182 and note. *State v. Farmer*, 21 Mo., 160. *State v. Johnson*, 12 Ala., 840. *Van Dresser v. King*, 34 Penn. State., 201. *Mussey v. Cahoon*, 34 Maine, 74.

COBB, J.

There can be no doubt that, under the authorities, the plaintiff could have brought his action against the sheriff

and his sureties, and by proper averments and proofs made this an action for misconduct in office, and the official sureties of the sheriff would be held for the damages caused by such misconduct. In such case a justice of the peace would not have jurisdiction, the same being prohibited by sec. 907 of the code.

But is the plaintiff restricted to this remedy and consequently to a court of record in which to prosecute it? None of the cases cited go that far. The fact of the defendants being sheriff and deputy sheriff respectively, does not exempt them from the action of trespass, or of trover and conversion. The petition, as the writer understands it, presents a cause of action of the latter designation, as actions at law were formerly known, a cause of action of which a justice of the peace has unquestioned jurisdiction. The defendants come in with their answer, in which they set up certain facts which, if proved, would probably constitute a defense to the action. But it may be safely laid down as a rule, that matters stated in an answer of a defendant in a proceeding in a court of justice, can neither give nor take away the jurisdiction of the court to hear and determine the cause. If the facts set up in their answer by the defendants had been sufficiently proved at the trial to have controlled the verdict of the jury, they would have been entitled to a judgment, but such judgment would not have been one of dismissal for want of jurisdiction in the court to try the cause, but would have been on the merits and final.

In the course of the trial the defendants objected to several different questions put to plaintiff's witnesses, and referring to them, by page of the record, he makes the point that the court erred in allowing the witnesses to answer leading and suggestive questions. By referring to the record we find that in many of the instances there seems to have been no ruling of the court at all on the objections made, and in many others where there was

a ruling, there was no exception thereto, and in all cases where there was a ruling and an exception saved, the objection seems to have been made rather to the form than to the substance, and in no instance do we think there was error in the admission of testimony sufficient to vitiate the verdict. Plaintiffs in error make the further point that the court ruled out testimony of the defendant that plaintiff below had other cows than the one claimed by him as exempt, as being his only cow. By reference to this testimony it appears that plaintiff below had testified, on cross-examination by defendants, that certain cows were the produce of a cow bought by his wife with money given her by her mother. Defendants asked him how much money she gave her. Witness answered, "I think \$25 or \$30."

Q. When was that?

A. Twelve years ago last fall.

After several further questions and answers, defendants returned to this matter of the amount of money given by the mother-in-law of the witness to his wife, with which she bought the cow, and asked the following question:

Q. You do not know how much money?

A. I do not recollect.

Q. Cannot you refresh your memory and say how much it was?

Plaintiff objects as immaterial. Objection sustained and defendants except.

The witness, plaintiff below, had already stated the amount at \$25 or \$30, and had twice stated that he did not remember which. We cannot see that such difference was at all material, or tending in the least to show that witness himself was the owner of the cows.

And so of the other points in reference to the admission of testimony.

The instructions asked for by plaintiffs in error were properly refused, because not applicable to the testimony in the

Haskins v. Citizens Bank.

case. The evidence is sufficiently conclusive that the plaintiff below claimed the property as exempt from the sheriff; that the plaintiff in execution was apprised of such claim and gave a bond of indemnity, before the sheriff would sell the property.

The last point made by the plaintiff in error is that: "The court erred in neglecting and refusing to instruct the jury in writing on its own motion." We know of no law, or reason, which requires a court, where proper and sufficient instructions have been presented by the parties, and given in charge to the jury, to give other instructions on the judge's own motion, and to give such would be quite superfluous.

Seeing no prejudicial error in the case, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

DANIEL W. HASKINS, PLAINTIFF IN ERROR, v. THE CITIZENS BANK, DEFENDANT IN ERROR.

1. **Action in Partnership Name: VARIANCE.** In an action brought by a partnership, a variance in the title between the summons and bill of particulars, as where in the former it is in the names of the individual partners, and in the latter the firm name, is immaterial, if no objection is made by the defendant on that ground, but if objection be made, the defect may be cured by amendment.
2. —: **COSTS.** When an action is brought by partners in their firm name, the statute requires them to give security for costs. Regularly this security should be given before the delivery of the summons for service, but the failure to do so is not fatal to the action, and it may be done afterwards on objection by the defendant for the want of it.
3. **Service of Summons: DEPUTATION OF PERSON TO SERVE IT.** The statute, Sec. 1094 of the code of civil procedure, authorizes a justice of the peace, under certain circumstances, to depute a person to serve a summons. A deputation in these words:—"The State of Nebraska, to Job Hathaway, of said county, specially deputized to serve these papers. Greeting;" indorsed on the summons, *held*, sufficient.

19	30
31	227
12	39
39	519

ERROR to the district court for Fillmore county. Tried below, before WEAVER, J.

W. H. Morris and J. Jensen, for plaintiff in error.

Hastings & McGintie, for defendant in error.

LAKE, J.

This is a proceeding in error to review the action of the district court for Fillmore county, in affirming a judgment rendered by a justice of the peace. We are to inquire, therefore, whether any material error appears in the proceedings certified by the justice, in the matters complained of.

It must be conceded that, in some of the steps taken, there was at least irregularity. For instance, the bill of particulars gave as plaintiffs, John P. Clarey and Walter H. Scott, partners doing business under the style and firm name of "The Citizens Bank," while the summons, by which the action was commenced, omitted the individual names altogether, and gave simply, "The Citizens Bank." The action was brought, therefore, in the partnership name, and under sec. 26, of the code of civil procedure, security for costs ought to have been given before the summons was delivered for service.

But neither of these irregularities was fatal. The action as brought was authorized; and no objection having been interposed to the variance between the summons and bill of particulars, that defect was waived. But, even if an objection on that ground had been made, the justice was authorized to allow the bill of particulars to be so amended as to conform to the summons in this respect. As to the requirement of security for costs, that is in no respect jurisdictional. It is merely a statutory regulation for the special benefit of the defendant, and which he may waive, and indeed does waive, by failing properly

to insist upon its enforcement. If, in such a case, no security has been given, and the defendant, as he may do, move for a dismissal of the action on that ground, the justice should, by a conditional order, require it to be furnished within a reasonable time, and if not, that the motion be granted. Accordingly we hold that it was not too late, after the service and return of summons, to give the required security for costs.

Another ground for alleged error is, that the justice had no jurisdiction over the person of the defendant, for the reason, as is claimed, that the service of the summons was by a person unauthorized by law to serve the same.

Sec. 1094 of the code of civil procedure provides that "A justice, at the request of a party, and on being satisfied that it is expedient, may specially depute any discrete person of suitable age, and not interested in the action, to serve a summons or execution, with or without an order to arrest the defendant, or to attach property. Such deputation must be in writing on the process."

On the face of the summons served upon the defendant we find this direction to the person who served it, viz.: "The State of Nebraska, to Job Hathaway, of said county, specially deputized to serve these papers, Greeting: You are hereby commanded to summon D. W. Haskins, to appear before me," etc. It is true that this deputation is rather informal, but it is quite sufficient to show that the person named was selected by the justice to make the service, and is a substantial compliance with the statute in this particular. The appointment does not show that the justice was requested to make it, nor that he was satisfied that it was expedient to do so; but these facts will be presumed from the appointment being made. The statute does not require these precedent conditions to the deputation to be certified by the justice, nor entered upon the writ, but only the deputation itself.

The objection that the place where, by the terms of the

 Martin v. Scott.

summons, the defendant was required to appear and answer is not sufficiently definite, is not well taken. The language: "before me, F. M. Shirley, at my office in Exeter, Nebraska," seems to have been definite enough to enable the defendant to appear at the appointed time, and it is not claimed the place of the office was not within the precinct for which the justice was elected. There is no merit in this objection.

JUDGMENT AFFIRMED.

12	42
21	41
19	42
33	160

WILLIAM H. MARTIN, PLAINTIFF IN ERROR, v. WILLIAM T. SCOTT AND FRANK K. ATKINS, ADMINISTRATORS OF THE ESTATE OF WILLIAM MCWHIRTER, DECEASED, DEFENDANTS IN ERROR.

1. **Evidence: BOOK ACCOUNT.** Plaintiff offered himself as a witness to prove his "book of account" and was properly rejected. He then introduced his wife, who was sworn and testified as to the identity of the book of account of her husband, the plaintiff, that the charges were in his handwriting, made by him at or near the date of the services charged for, etc. Whereupon the book was offered in evidence to the jury and excluded. *Held*, error.
2. ———: ———. The defendants offered in evidence the note register or book of bills receivable of the decedent's bank to prove that sometime pending the making of the account sued on the decedent had in his bank the note of plaintiff for \$107.23 secured by chattel mortgage, which was admitted as evidence to the jury. *Held*, error.

ERROR to the district court for York county. Plaintiff filed a claim for medical services, etc., in the county court, against the estate of McWhirter, amounting to \$459.00. The county court having allowed \$35.00, Martin appealed, and on trial in the district court, before Post, J., and a jury, obtained a verdict and judgment for the same sum only, and thereupon brought the cause here for a review on a petition in error.

France & Sedgwick, for plaintiff in error.

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Plaintiff was a competent witness. *Anthony v. Stinson*, 4 Kan., 220. Book of account was admissible. Civil code, sec. 946. 1 Greenleaf Ev., sec. 20.

William T. Scott & W. W. Giffen, for defendants in error.

Plaintiff could not testify in his own behalf. Laws 1877, p. 13, [Comp. Stat., 575]. Kansas statute, on which decision in 4 Kan., cited by plaintiff was based, is different from ours. Kansas Code, sec. 922. *Kisling v. Shaw*, 33 Cal., 446. Book account of plaintiff was properly excluded. Testimony of Mrs. Martin showed that she did not know *of her own knowledge* either that the book was one of original entries, or that the charges were made at or near the time of the transactions therein entered. Gen. Stat., 584. On cross-examination she testified that she came to Nebraska in February, 1878. The date of the first item on the account sought to be proved by the book, is October 9th, 1876. Even if the book should have been admitted, when this fact appeared on cross-examination, it would have been the duty of the court, on request, to have withdrawn it. If its exclusion was error at all, it was error without prejudice. *Dillon v. Russell*, 5 Neb., 484.

COBB, J.

The plaintiff offered himself as a witness to prove his book of accounts for the purpose of introducing it in evidence, which offer was refused. He then introduced Mrs. W. H. Martin, his wife, as a witness, who testified, among other things, as follows:

Q. State whether you knew William McWhirter in his life-time?

A. Yes.

Q. Did you know his condition, as to health?

A. Yes.

Q. You may state how that was, whether he was a healthy man or not?

A. He was very delicate, I know.

Q. You may state whether you know what the business of your husband is?

A. Yes, sir. He is a physician.

Q. Now you may state, whether or not you know of his treating Mr. McWhirter in his life-time?

A. Yes, sir.

Q. You may state, about how long you know of his treating him?

A. I know of his treating him after I came, about two years and a half. Near that.

Q. You may state, whether you know of a book he kept, in which he kept his accounts against McWhirter?

A. Yes. I knew him to keep the account in a little small book.

Q. I will ask you to state, if this is the book, (handing witness a memorandum book).

A. Yes.

Q. I will ask you if you know of his keeping this account from day to day or frequently?

A. Yes, sir, frequently.

Q. I will ask you, if you know of this book containing the original entries of the account?

A. Yes.

Q. You may look at this book and state, if you know the account that is kept in it?

A. Yes.

Q. What is kept in it?

A. McWhirter's account is kept in it. I know it from the doctor's signature in there, and from two or three other little things. I remember some cross marks.

Q. You may state, who kept the account in that book?

A. Dr. Martin.

Q. Will you turn to the page in that book, where the account is kept?

A. That is it, (indicating page).

Q. Mrs. Martin, did you testify as to whether your husband treated McWhirter professionally?

A. Yes, he did.

Q. Do you know when it was he treated him?

A. Yes.

Q. State whether you know, whether at the time he was treating him, he kept any account of what McWhirter owed him for his services?

A. Yes, sir.

Q. Was that account kept at the time of the treatment?

A. Yes, sir.

Q. Mrs. Martin, you say you have seen that book before?

A. Yes, sir.

Q. You may state what it was used for?

A. To keep McWhirter's account.

Q. Will you state to the jury who kept that account?

A. Dr. Martin.

Q. Do you know, whether he made the entries in that book?

A. Yes, sir.

Q. Do you know whether these entries were made at the time of the services? Do you know whether those entries in that book were made at or near the time the services were rendered?

A. Yes, sir.

Q. How was that, were they or not?

A. They were made, sometimes just after, sometimes just at the time.

Q. Were you personally aware of that fact?

A. Yes, sir.

Q. Will you state, whether or not you know, as to whether that book is the doctor's book of original entries of his accounts?

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A. I know it to be a fact, this is the book the doctor kept McWhirter's account in.

Q. The question is, whether you know whether this is the doctor's book of original entries for those accounts?

A. Yes, sir.

Whereupon the plaintiff offered the account book in evidence. To which counsel for the defendant objected, and the objection was sustained by the court and the book excluded.

There can be no doubt of the correctness of the ruling of the court excluding the plaintiff as a witness in his own behalf, even for the purpose of proving his account book. The language of the statute [sec. 329, of the code of civil procedure] is quite unequivocal and is conclusive of that point. But we think that the book was sufficiently proved by Mrs. Martin and should have been permitted to go to the jury for what it was worth.

Sec. 346 of the code is as follows: "Books of account containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence only under the following circumstances, subject to all just exceptions as to their credibility: *First.* The books must show a continuous dealing with persons generally, or several items of charges at different times against the other party, in the same book. *Second.* It must be shown by the party's oath, or otherwise, that they are his books of original entries. *Third.* It must be shown in like manner, that the charges were made at or near the time of the transaction therein entered, unless satisfactory reasons appear for not making such proof. *Fourth.* The charges must also be verified by the party or the clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why the verification is not made."

In the case of *Bentlys admr. v. Hollenbeck*, Wright's (Ohio) Repts, 168, it was held, that when the intestate

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who made the entries in the account book was dead and the book offered by his administrator, who made oath that they came to his hands as the genuine and only books of account of the deceased, that to the best of his knowledge and belief the entries were original and contemporaneous with the fact and the debt unpaid, with proof also of the party's handwriting, that the book was properly received in evidence. Where the party had since become insane his account book was admitted in evidence on proof of the fact and that the entries were in his handwriting with the supplementary oath of his guardian. *Holbrook v. Gay*, 6 Cush., 215. See also 1 Greenleaf on Ev., §§ 117 and 118 *and notes*.

While we recognize fully the authority of *Wamsly et al, v. Crook & Hall*, 3 Neb., 344, that case does not sustain the position of the defendants in this. While the law makes the living party equally silent with the dead one, it goes no further. While the one though dead may speak through his books of account, shall the other while living be deprived of the same means of vindicating his rights? The language of our statute above quoted seems to have been chosen with reference to all cases, where by reason of the death, or disability from any cause, of the party making the entries in the account books, to make the proper verification; and in all such cases it either dispenses with the verification, or lets in such as the nature of the case will admit. And under the circumstances of this case, the evidence of Mrs. Martin was sufficient verification of the plaintiff's account book, to render it admissible as evidence to the jury.

The next error assigned and deemed important to notice, is the permitting of the defendants to give in testimony to the jury, the register of bills receivable of the deceased. This book appears to have been introduced for the purpose of showing that at sometime pending the making of the account upon which the suit was brought,

Rogers v. Pierce.

the deceased, McWhirter, held in his bank a note of the plaintiff for \$107.25, secured by chattel mortgage. The note register, or collection register, or as it is called in this case, the book of bills receivable, kept by a bank or banker, is not a "book of account," in the sense in which that term is used, either in the statute or at common law, as they do not contain "charges by one party against the other made in the ordinary course of business." And in no case are account books evidence of any transactions even between the parties other than goods, wares or merchandise, sold or delivered, and work, labor or services performed. But an equally fatal objection to the admission of this book in evidence is, that it does not tend in the remotest degree to disprove the claim of the plaintiff, nor have the facts, which it might be admitted to establish, the least bearing upon any point in issue in said case.

There are other assignments of error in the case, but as, for the reasons above given, there must be a new trial, it is not deemed important to discuss them.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

ALEXANDER ROGERS, PLAINTIFF IN ERROR, v. JOHN K.
PIERCE AND DAVID C. PIERCE, DEFENDANTS IN ERROR.

Chattel Mortgage: CONVERSION. One H., a resident of K. county, executed in A. county a chattel mortgage upon a horse to P. and P., on the 6th of September, 1879, which mortgage was recorded on the 23d of the same month. On or before the 19th of September of that year H. sold the horse to P., who, on the 6th day of October, 1879, sold the same to R., who traded the same for other property. In an action by the mortgagees against

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R. for conversion, *held, First*, that P. having purchased the horse before the mortgage was recorded, the presumption is that he purchased without notice, and the burden of proof is on said mortgagees to show such notice. *Second*, a purchaser from one not having notice is not liable for conversion of such property.

ERROR to the district court for Adams county. Tried below before GASLIN, J. The opinion states the case.

Batty & Ragan, for plaintiff in error.

Mortgage was void. Place of sale should have been Kearney county. Gen. Stat., 482. Powers had a right to purchase the horse before mortgage was placed on file. *Travis v. Bishop*, 13 Met., 304. *Fuller v. Paige*, 26 Ill., 358. *Mayham v. Coombs*, 14 Ohio, 428. Herman on Chattel Mortgages, 307. Pierce Brothers must bear the loss. *Smith v. Worman*, 19 Ohio State, 145.

George F. Work and *T. D. Scofield*, for defendants in error.

Owner, or one entitled to immediate possession, may pursue and recover his property in the hands of an innocent purchaser. *Railroad Co. v. Kaulbrummer*, 59 Ill., 152. *Clark v. Wells*, 45 Vermont, 4. *Seago v. Pomeroy*, 46 Geo., 227. Every person who aids or assists in the conversion of property, whether with knowledge of the facts or not, is responsible to owner for all damages sustained by him. Rogers knew of the mortgage, and that it was duly filed, long before he sold the horse. *Stephens v. Elwall*, 4 Maule & S., 559, 561. *Parker v. Godin*, 2 Str., 818. *Yost v. Stout*, 4 Coldw. (Tenn.), 202. Pierce Bros., being entitled to the immediate possession of the property, they are entitled to recover even though Rogers bought the horse in good faith, Rogers having personal knowledge of the existence of the mortgage, and also on his personal promise to return the horse or settle for him. *Dixon v. Caldwell*, 15 Ohio St., 412. *Tallman*

Rogers v. Pierce.

v. Turck, 26 Barb., 167. *Moulton v. Moulton*, 40 Vt., 242.
Flanders v. Colby, 28 N. H., 84.

MAXWELL, CH. J.

On the 6th day of September, 1879, one Heath, a resident of Kearney county, purchased a horse from the defendants at Hastings, in Adams county, for the sum of one hundred dollars, and executed a mortgage on the same to secure the payment of eighty dollars with ten per cent. interest, on the 1st day of September, 1879. On or about the 19th day of September, Heath sold the horse in question to one Powers, who, on or about the 6th day of October of that year sold said horse to the plaintiff for about the sum of eighty dollars. There is no testimony tending to show that Powers had notice of the existence of the mortgage at the time he purchased the horse, or that the plaintiff at the time of his purchase had any actual notice of its existence. On or about the 20th day of October, 1879, one of the defendants went to the residence of the plaintiff and demanded the horse in question, claiming the same under the mortgage. There is a conflict in the testimony as to whether or not the plaintiff was permitted by the defendants to retain the horse in question upon his promise to pay for the same; and in the view we take of the case, it is entirely immaterial whether such promise was made or not, as it will not sustain the action without a consideration, that is, unless the mortgage was valid as against Rogers. The plaintiff afterwards traded off the horse for other property. The defendants, after demand therefor, brought an action for conversion of the horse, and recovered the sum of ninety dollars. The cause is brought into the court by petition in error.

Sec. 14 of Chap. 32 of Comp. Stat. provides that:
"Every mortgage or conveyance intended to operate as a

mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgager and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the county clerk of the county where the mortgagee executing the same resides, or, in case he is a non-resident of the state, then in the office of the clerk of the county where the property mortgaged may be at the time of executing such mortgage, and such clerk shall endorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for the inspection of all persons; and such mortgage or instrument may be so filed, although not acknowledged, and shall be valid as if the same were fully spread at large upon the records of the county."

Powers is shown by the testimony to have purchased the horse before the mortgage was recorded, and in the absence of proof to the contrary he is presumed to be a *bona fide* purchaser, and the burden of proof is on the defendants to show that he had notice of their mortgage. *Fort v. Burch*, 6 Barb., 78. *Center v. Bank*, 22 Ala., 748. *McCormick v. Leonard*, 38 Ia., 272. *Miles v. Blanton*, 3 Dana, 525. *Van Wagenen v. Hopper*, 8 N. J. Eq., 707. The reason is, the first purchaser being entitled to hold and enjoy the property thus purchased, he is equally entitled to sell the same. *Alexander v. Pendleton*, 8 Cranch, 462. *Jackson v. Given*, 8 Johns., 141. *Bumpus v. Platner*, 1 John Ch., 219. *Demaret v. Wyncoop*, 3 Id., 147. If Powers was a *bona fide* purchaser, he could convey to whom he pleased, as a purchaser, without notice, may convey to one with notice and the latter will be protected. This is decisive of the case. There is an entire failure of proof tending to show that Powers was not

a *bona fide* purchaser, and without such testimony the defendants in error can not recover.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

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16 265
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WILLIAM R. STRINE, PLAINTIFF IN ERROR, v. S. KINGSBAKER
AND BROTHER, DEFENDANTS IN ERROR.

Justice of Peace: SETTING ASIDE JUDGMENT BY DEFAULT. When judgment is rendered by default before a justice of the peace, the defendant, by paying or confessing judgment for costs in the case, may, as a right, have the judgment set aside by filing a motion to that effect at any time within ten days from the date of the rendition thereof.

ERROR to the district court for Otoe county. Tried in district court before POUND, J. The opinion states the case.

C. W. Seymour, for plaintiff in error.

Covell & Ransom, for defendant in error.

MAXWELL, CH. J.

On the 6th day of August, 1880, the defendants in error commenced an action against the plaintiff, before a justice of the peace, to recover the sum of \$100.00 upon a draft alleged to have been accepted by said plaintiff. A summons was issued returnable August 9th at 9 o'clock A. M., and was duly served. No appearance was made by the plaintiff in error at the time the summons was returnable and judgment was rendered against him by default, and an execution thereupon issued on said judgment. This execution seems to have been levied on property of the plaintiff in error, as there is an entry of

Strine v. Kingsbaker.

a claim of exemption, but nothing to show on what property it was levied. On the same day on which the judgment was rendered, the plaintiff in error offered to confess judgment for costs in the action, and moved to set the judgment aside, upon the ground that it was rendered in his absence. The motion, on the 23d day of August of that year, was overruled. The case was taken on error to the district court where the judgment of the justice was affirmed. The case is brought into this court by petition in error.

The question to be determined is the right of the plaintiff in error to have the judgment by default set aside and be permitted to defend.

Sec. 1001 of the code of civil procedure provides that: "When judgment shall have been rendered against a defendant in his absence, the same may be set aside upon the following conditions: *First*, That his motion be made within ten days after said judgment was entered. *Second*, That he pay or confess judgment for the costs awarded against him. *Third*, That he notify in writing the opposite party, his agent or attorney, or cause it to be done, of the opening of such judgment and of the time and place of trial, at least five days before the time, if the party reside in the county, and if he be not a resident of the county, by leaving a written notice thereof at the office of the justice ten days before the trial." Comp. Statutes, 645.

The provisions above quoted seem to be imperative, the only conditions being that the motion be made within ten days and that the defendant pay or confess judgment for costs. Both of these requirements were complied with by the plaintiff in error. The statute does not require the defendant in such case to state his defense. The defendant, even on the trial of a cause in justice court, is not required in the first instance to state his defense in writing, and may even prove a set-off or counter claim

The State v. Cass County.

without pleading the same, unless required by the plaintiff to file a bill of the particulars of his claim or set-off. No appeal can be taken to the district court, except a defense has been interposed on the trial before the justice. *Cledenning v. Crawford*, 7 Neb., 474. The reason being as stated in the case above cited; "It would defeat the main object for which justices' courts were established, namely, the trial and disposal of causes or controversies with the least possible expense to the parties, where the amount involved does not exceed one hundred dollars."

The judgment of the justice and also of the district court is reversed and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED.

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19	163
24	612
13	54
47	161

THE STATE OF NEBRASKA, EX REL. JOHN OSSENKOP, v. THE
COUNTY COMMISSIONERS OF CASS COUNTY.

Intoxicating Liquors: LICENSE. In an application for mandamus against county commissioners to compel the issuance of license for the sale of intoxicating liquors, they answered as cause of refusal that the relator "had sold liquors to minors, had sold liquors on Sunday and had kept a disorderly and gambling house, all within twelve months before the hearing of said cause." *Held*, *First*, That the answer states good cause for refusing to grant license. *Second*, That county commissioners have a discretion as to whether they will issue license or not, and their action therein cannot be controlled by mandamus.

ORIGINAL application for mandamus.

E. F. Smythe and *Homer Stull*, for relator.

Smith & Strode, for respondents.

MAXWELL, CH. J.

This is an application for a writ of mandamus

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to compel the defendants, who are county commissioners of Cass county, to issue a license to the relator, to sell intoxicating liquors at Louisville, in Cass county. The relator states in his application, that he is a man of respectable character and standing, and a resident of this state, and that he has complied with all the requirements of the law to entitle him to obtain license, but that the defendants refuse to grant the same. The defendants, in answer to the application, allege that the petition of the relator praying for license was not signed by thirty resident freeholders of the township of Louisville, and further allege that a remonstrance was filed with them against the issuance of a license to said relator; that a day was set for the hearing of said cause and witnesses examined under oath and their testimony reduced to writing; that from this testimony it was satisfactorily shown to the defendants, that the relator had violated the statutes of the state in this to-wit: "had sold liquor to minors; had sold liquor on Sunday and had kept a disorderly and gambling house, all within twelve months last past prior to the hearing of said cause, and the respondents therefore deemed it inexpedient and against the public good to grant license to the relator and refused to grant the same." And that the relator has taken an appeal from said decision of the respondents. The case is submitted upon the pleadings. Two questions are thus presented for our consideration.

First. Does the answer constitute a defense?

Second. Will mandamus lie to compel county commissioners to issue license for the sale of intoxicating liquors?

The questions will be considered in their order. It is the intention of the law to place the sale of intoxicating liquors in the hands of respectable law-abiding men. The petition for license must state that the applicant is a man of respectable character and standing, and the fact that

Hamilton County v. Bailey.

he does not possess such character would be sufficient cause for refusing a license. The provision for filing a remonstrance against the issuance of license is to enable those objecting to it to present testimony showing that the applicant is not a man of respectable character, or that he has been guilty of violating some of the provisions of the act within one year before the hearing, or that a former license was revoked. In all such cases it is the duty of the board to refuse to grant a license. The answer therefore states valid reasons for refusing to grant the license.

Second. Section 1, of Chap. 50, of the Comp. Statutes provides that "the county board of each county may grant license for the sale of malt, spirituous and vinous liquors if deemed expedient, upon the application by petition of thirty of the resident freeholders of the town," etc. This gives the county commissioners discretion in issuing licenses. If in their opinion it is inexpedient to issue such licenses, mandamus will not lie to compel them. The statute has placed the whole matter, so far as it relates to counties, under the control of the county commissioners and in case they refuse for cause to issue license, their action therein, being discretionary, cannot be controlled by mandamus. The writ must therefore be denied.

WRIT DENIED.

THE COUNTY OF HAMILTON, PLAINTIFF IN ERROR, v. G. W. BAILEY, DEFENDANT IN ERROR.

1. **Revenue:** PUBLISHING DELINQUENT TAX LIST. The revenue law of 1879 does not repeal the act approved February 19th, 1877, so far as it requires a notice of the sale of lands and lots, upon which taxes levied prior to September 1st, 1879, are delinquent, to be published in a newspaper.

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15 580
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19 214
19 492
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28 574
13 56
558 599

Hamilton County v. Bailey.

2. ———: ———. If the county commissioners fail to let the contract for publishing such tax list to the lowest bidder, it is the duty of the county treasurer to cause such notice to be published for a sum not exceeding that fixed by statute.
3. **Accounts against County: APPEAL.** Where an account is filed with the board of county commissioners and allowed in part, and a warrant, drawn for the sum thus allowed, is accepted by the claimant, he thereby waives his right of appeal.

ERROR to the district court for Hamilton county. Tried below, before Post, J. The facts of the case are stated in the opinion.

A. W. Agee, for plaintiff in error.

J. S. Miller and *J. H. Smith*, for defendant in error.

MAXWELL, CH. J.

In December, 1879, G. W. Bailey filed the following account with the commissioners of Hamilton county:

Sept. 17,	Bridge Notice,	\$.85
Sept. 17,	Road Notice, 4mo., 2 squares,	\$5.00
Oct. 4,	1864 Land Descriptions, @ 20 cts.,	\$272.80
" 4,	594 Town Lot Descriptions, @ 10 cts.,	\$59.40
Nov. 17,	500 Election Certificates,	\$2.00
" 22,	Notice to Supervisors,	\$1.20

Of this account \$9.05 was allowed for blanks and notices on the 6th day of Dec., of that year, and \$195.70 for publishing the delinquent tax list. On the 24th day of December, of that year, the claim was reconsidered and the matter continued to the next session of the board. At the next session of the board Bailey was again allowed \$195.70 for publishing the delinquent tax list. He thereupon served notice upon the board of his intention to appeal to the district court, and soon thereafter, and before the expiration of twenty days from the time said account was allowed, applied to the county clerk and obtained the warrant drawn in his favor on said account, and on presenting the same to the county treasurer re-

Hamilton County v. Bailey.

ceived the sum of \$195.70 in cash. On appeal to the district court the county filed an answer to Bailey's petition, and also filed a cross-petition asking a judgment against him for the sum of \$195.70, and interest, claiming that said sum of \$195.70, so allowed by the commissioners and drawn by Bailey, was without authority of law, and was by said Bailey fraudulently obtained; and, upon the trial of said cause, the court dismissed both the plaintiff's petition, and the defendant's cross petition, and rendered judgment against Bailey, for costs. The County of Hamilton brings the cause into this court by petition in error, to reverse the judgment of the district court dismissing its cross-petition; and the plaintiff below brings the cause into this court by petition in error, to reverse the judgement of the district court dismissing his petition.

The errors assigned will be considered in their order.

First. It is objected there was no authority to publish in a newspaper a notice of the sale of lands for the delinquent taxes of 1878. We are referred to sec. 109, of "an act to provide a system of revenue," approved March 1st, 1879, as sustaining this position. The section referred to provides that: "On the 1st Monday of November in each year, between the hours of 9 o'clock A. M. and 4 o'clock P. M., the treasurer is directed to offer at public sale at the court house or place of holding court in his county or at the treasurer's office, all lands on which a tax is levied for state, county, township, village, city, school district, or any other purpose, for the previous year still remaining unpaid, and he may adjourn the sale from day to day until all the lands, lots or blocks have been offered. No notice of such sale by advertisement or otherwise shall be required, but in all cases the provisions of this chapter shall be sufficient notice to owners of the sale of their property." [Comp. Stat., 420.]

This section, taken by itself, would require no notice to

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be given, but section 183 provides that "an act entitled an act to provide a system of revenue" approved February 15th, 1869, and all acts and parts of acts supplemental to and amendatory thereof, and all acts and parts of acts inconsistent with the provisions of this act, are hereby repealed; *Provided*, that such repeal shall not in any manner affect any rights heretofore acquired, or the collection of any taxes heretofore levied or assessed, or the validity of any sales for taxes heretofore made, or any right heretofore acquired under any law of this state." The repeal of the act of 1869 and acts amending the same by the act which took effect September 1st, 1879, does not in any manner affect the collection of any taxes levied prior to that date. In other words, the same proceedings are to be had for the collection of taxes previously levied as existed at the time of the passage of the act of 1879.

Sec. 5, of an act to amend the revenue law, approved February 19, 1877, provides that: "The treasurer shall give notice of the sale of real property by the publication thereof, once a week, for three consecutive weeks, commencing the first week in October preceding the sale, in a newspaper in his county if there be one, and if there be no paper published in his county, shall give notice by a written or printed notice, posted on the door of the court house or building in which the courts are commonly held, or the usual place of meeting of the county commissioners, for three weeks previous to the sale. Such notice shall contain a notification that all lands on which the taxes of the preceding year (naming it), remaining unpaid, will be sold, and the time and place of the sale, and said notice must contain a description of the lands to be sold and the amount of taxes due. The treasurer shall add to each description of land so advertised, the sum of twenty cents, other than town lots, and for each town lot the sum of ten cents, to defray the expenses of advertising, which amount shall be paid by the county treasurer

at the expiration of the sale, upon affidavit of the publisher; *Provided*, the county commissioners shall let the printing of the delinquent tax-list to the lowest and best bidder, at a price not exceeding the rates aforesaid."

This section applies to all lands and lots upon which taxes, which were levied prior to September 1st, 1879, are delinquent. The publication of the notice therefore was required by law.

Second. But it is objected, that the county treasurer caused the publication of the notice, and that the county commissioners failed to let the contract for printing the same to the lowest and best bidder.

Sec. 5 of the act of 1877 requires the treasurer to give notice of the sale of real property by the publication thereof, etc. This duty is specially enjoined upon him. It is the duty of the county commissioners to invite bids for printing the delinquent tax list and let the same to the lowest and best bidder; but if they fail to do so it is the duty of the treasurer to procure the publication of the notice, and in the absence of a contract for a less sum the party publishing the same would be entitled to the amount fixed by the statute. But the defendant having accepted the amount allowed by the county commissioners on his account, is bound by the award and thereby waives his right to appeal. He cannot accept the amount awarded to him by an order or judgment, and thereby receive the benefit of the same and appeal from such order or judgment. *The Ind. School Dist. of Altoona v. The Dist. Th. of Delaware*, 44 Iowa, 201. *M. M. R. R. Co. v. Byington*, 14 Id., 572. *Borgalthous v. The Farmers and Merchants Ins. Co.*, 86 Id., 250. But even if an appeal would lie it is impossible to review the finding of the county commissioners or district court. The items of the account are not given, and there is no testimony showing what items were rejected and what allowed.

Baldwin v. The State.

Error must affirmatively appear of record to justify this court in reversing a judgment.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

WILLIAM B. BALDWIN, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law: INDICTMENT.** An indictment for manslaughter is not defective because it does not charge the offense to have been committed with "malice aforethought."
2. ———: **PLEA IN ABATEMENT.** A plea in abatement to an indictment upon the ground that the grand jury were not legally selected and chosen must point out the particular cause of illegality.
3. ———: **INDICTMENT.** An indictment may contain a count for murder in the first degree, with one for murder in the second degree, and for manslaughter, when but one homicide is charged.
4. ———: **INSTRUCTIONS.** Erroneous instructions must be excepted to and brought to the attention of the trial court in the motion for a new trial to be available in a reviewing court, unless the error is so vital in its nature as not to justify the conviction of the accused.

ERROR to the district court for Adams county. Tried below before GASLIN, J. The case is stated in the opinion.

J. M. Abbott and John Saxon, for plaintiff in error.

Indictment is insufficient. 1 Bishop on Criminal Law, sec. 429. Demurrer to plea in abatement should have been overruled. Demurrer admits facts set up in plea, and indictment ought to have been set aside. Manslaughter is not a degree of the crime of murder, but is a separate and distinct statutory offense, and as such is not within sec. 487 of the criminal code of Nebraska. Comp.

12	61
18	68
19	61
40	548
19	61
46	563
12	61
61	586

Stat., 737. Sec. 489, of the criminal code under which said verdict is claimed to be authorized is obnoxious to sections 7, 8, 9, 10 and 11, of the Bill of Rights, in so far as it permits a person to be tried for an offense not specifically presented by an indictment. It permits the exact nature and cause of an accusation to be concealed from the accused on trial. Const. Neb., sections 7, 8, 9, 10 and 11.

C. J. Dilworth, Attorney General, for the State.

MAXWELL, CH. J.

The plaintiff was found guilty of manslaughter at the May, 1880, term of the district court of Adams county, and sentenced to imprisonment in the penitentiary for ten years. He now prosecutes a writ of error to this court. The bill of exceptions is not signed by the judge, and on motion of the attorney general was quashed. None of the testimony is therefore before the court, and the only errors that can be considered are those presented by the record.

First. It is objected that the indictment is insufficient, in that it does not charge that the alleged acts of the accused were of his deliberate and premeditated "malice aforethought."

Whether the indictment is sufficient to sustain a conviction for murder is not now before the court, but it is clearly sufficient to sustain a conviction for manslaughter, and no objection has been pointed out on this ground.

Second. It is claimed that the court erred in sustaining a demurrer to the plea in abatement. The plea is as follows: "And now comes said defendant and says, that having heard read the indictment now pending herein against him and hereby reserving other pleas and defenses thereto, avers that the grand jury of the present term of this court was not lawfully selected, chosen and impaneled in this that the vast majority of said grand jurors, for some

reason unknown to this defendant, was selected, chosen and taken from a single precinct in said county, to-wit: Denver precinct, and that said grand jurors were not selected and chosen as nearly as may be in proportionate number from each precinct in said county," etc.

In *Priest v. The State*, 10 Neb., 393, it is held that a plea in abatement must state facts and not mere conclusions of law.

Sec. 441, of the criminal code, provides that: "A plea in abatement may be made when there is a defect in the record, which is shown by facts extrinsic thereto." It is essential that the facts should be stated out of which the defense arises.

Sec. 615, of the code of civil procedure, requires the county commissioners "to select sixty persons and as nearly as may be a proportionate number from each precinct in the county," etc.

Sec. 659 requires the county clerk or his deputy receiving the names, to write "the name of each person on a separate ticket, and place the whole number of tickets into a box or other suitable and safe receptacle," etc.

Sec. 660 provides that "the clerk of the district court or his deputy, and the sheriff, or if there is no deputy sheriff, the coroner of the county, shall at least ten days before the session of the court, meet together and draw by lot out of the box or receptacle wherein shall be kept the tickets aforesaid, sixteen names, and the persons whose names are drawn shall be grand jurors."

There are no facts stated in the plea from which it appears that the sixty names required by the statute were not properly selected, the ground of objection being that a large majority of all those drawn resided in Denver precinct. This of itself is not sufficient to quash the indictment if the jurors were properly selected. See *Clark v. Saline Co.*, 9 Neb., 516. The demurrer was properly sustained.

The third and fourth objections may be considered together, and are in substance that manslaughter is not a degree of the crime of murder, but a separate and distinct statutory offense, and that section 489 of the criminal code is obnoxious to sections 7, 8, 9, 10 and 11, of the bill of rights.

Section 489 provides "that in all trials for murder, the jury before whom the trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict, whether it be murder in the first or second degree, or manslaughter," etc. There is but one offense charged in the indictment in this case, viz: the unlawful killing of Allen J. Yokum. The different counts in the indictment merely charge the offense in the different degrees to meet the evidence. The reason for this practice is thus stated by Chief Justice Shaw: "The indictment is but the charge or accusation made by the grand jury, with as much certainty and precision as the evidence before them will warrant. They may be well satisfied that a homicide was committed, and yet the evidence before them leave it somewhat doubtful as to the mode of death; but in order to meet the evidence as it may finally appear, they are very properly allowed to set out the mode in different counts; and then if any one of them is proved, supposing it to be also legally found, it is sufficient to support the indictment. Take the instance of a murder at sea. A man is struck down, lies some time on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homicide, by the blow or by the drowning, but leaves it uncertain by which. That would be a fit case for several counts, charging a death by a blow and a death by drowning, and perhaps a third, alleging a death by the joint results of both cases combined." Bemis' Webster Case, 471. S. C. 5 Cush., 533.

The rule above stated is as applicable to a case of mur-

der under our statute, where the grand jury may be satisfied that a homicide has been committed by the accused, but whether "purposely and of deliberate and premeditated malice," the state may not be able to prove. But the homicide is the only offense charged, and the several counts of the indictment merely charge the different degrees of the offense, and therefore are not in conflict with the constitution.

It is claimed that the district attorney permitted an attorney in the employ of the railroad company to prosecute the indictment and conduct and direct the prosecution. It is sufficient to say, that no objection was made by the accused or his counsel to the attorney in question, assisting in the prosecution, and so far as this record discloses it was with their full concurrence. It is too late to raise the objection for the first time in this court.

A number of objections are made to the instructions, of which but one will be noticed. The twelfth instruction is as follows: "The prisoner has availed himself of the provisions of sec. 478, page 827, Gen. Statute Neb., which allows him to testify in his own behalf, and you will give it such credence as you may think it entitled to, bearing in mind the circumstances under which he testifies, and the vast importance to him to so tell his story as to escape the penalty of the law, applicable to a conviction under the indictment in the case."

The interest of a party in the event of the trial may be shown to the jury for the purpose of affecting his credibility; that is, the jury may consider this interest as a circumstance, which may or may not affect the credibility of the witness. But the court should not cast reflections on the testimony that would destroy its effect before the jury. The error, however, like many others arising during the progress of a trial, may be waived, and will be waived unless objection is made. It is like an error arising from the admission of improper testimony, or refusal

Marseilles Mnf. Co. v. Morgan.

to admit proper testimony. No exception was taken to the instruction, nor was the objection made in the motion for a new trial.

In *Thompson v. The State*, 4 Neb., 530, one Thompson had been convicted of grand larceny and sentenced to imprisonment in the penitentiary. In that case larceny was defined as "taking and carrying or leading away the personal property of another, without his consent and against his will, with intent to appropriate the same to the use of the taker." The court say: "An important ingredient that which distinguishes larceny from a simple trespass is omitted." The court therefore granted a new trial because in no view would such an instruction justify a conviction of a felony. But this does not apply to such errors as may be waived.

The sentence is not in strict conformity to the statute and if insisted upon, will be set aside and a writ of procedendo awarded, requiring the district court to re-sentence the prisoner. But as he has already been imprisoned for more than one year, the judgment will not be set aside, except at his request.

JUDGMENT ACCORDINGLY.

12	66
20	96
12	66
25	456
12	66
40	896
12	66
42	232

MARSEILLES MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

v. J. R. MORGAN, DEFENDANT IN ERROR.

Lien of Livery Stable Keeper. In December, 1878, one M., a livery stable keeper, received a span of horses belonging to C., to feed and care for, C. retaining the possession and using them daily. M. continued to feed the horses until March, 1879. On the first day of January, 1879, C. executed a mortgage on the horses to the M. Manf. Co. *Held*, that M. not having retained possession of the horses the lien of the mortgage was superior to his.

ERROR to the district court for Richardson county.

Marseilles Mfg. Co. v. Morgan.

Tried below, before WEAVER, J. The facts appear in the opinion.

A. Schoenheit and *E. W. Thomas*, for plaintiff in error, cited: *Brookover v. Esterly*, 12 Kansas, 149. *Wolfley v. Rising*, 12 Kansas, 535. *Duebner v. Koeboke*, 42 Wis., 819. *Tannahill v. Tuttle*, 3 Mich., 111. *Eggleston v. Munday*, 4 Mich., 295—304. *Robinson v. Fitch*, 26 Ohio St., 659. 1 Parsons Contracts 571, note. *Faulkner v. Meyers*, 6 Neb., 418. *Orchard v. Rackstraw*, 9 Com. B., 698. *Grinnell v. Cook*, 3 Hill, 485. *Ingalbee v. Wood*, 33 N. Y., 578. *Lewis v. Tyler*, 23 Cal., 364. *Willis v. Barrister*, 36 Vt., 220. *Goodrich v. Willard*, 7 Gray, 183. *Perkins v. Boardman*, 14 Gray, 481. *Brackett v. Bullard*, 12 Met., 308. *Cardinal v. Edwards*, 5 Nev., 36. *Legg v. Willard*, 17 Pick., 140.

Frank Martin, for defendant in error, cited Gen. Stat., 91. [Comp. Stat., 57.]

MAXWELL, CH. J.

On the 12th day of December, 1878, the defendant kept a livery stable in Falls City, Nebraska, and at that time received from one George W. Cornwall a span of horses to feed and care for. Cornwall was permitted to retain possession of and use the horses, and on or about the 1st day of January, 1879, he executed a mortgage on said horses to the plaintiff to secure the sum of \$187.85, payable May 1st, 1879. The defendant cared for said horses until about the 18th of March, 1879, when he brought an action and recovered judgment against Cornwall for the sum of \$66 and costs, for keeping said horses. An execution was thereupon issued on said judgment and levied on the horses, when the plaintiff, on the 28th of March, 1879, instituted an action of replevin under its mortgage and recovered possession of the horses. On the trial of the cause in the court below, the

court found in favor of the defendant, and found the value of his possession to be the sum of \$63.75. The plaintiff brings the cause into this court by petition in error.

The question to be determined is, has a livery stable keeper, who does not retain possession of the property, a lien for keeping horses superior to that of a mortgagee?

Sec. 28, of Chap. 4, Comp. Stat., provides that: "When any person shall procure, contract with, or hire any other person to feed and take care of any kind of live-stock, it shall be unlawful for him to gain possession of the same by writ of replevin or other legal process, until he has paid or tendered the contract price or reasonable compensation for taking care of the same."

Had the defendant retained possession of the horses in controversy from the time of receiving the same until the recovery of his judgment against Cornwall, his equity would be superior to that of the plaintiff. But it is clearly proved that Cornwall was permitted to use the horses in question during the entire period that they were fed by the defendant, and that the mortgage in question was executed while the horses were thus in Cornwall's possession. And there is no testimony tending to show that the plaintiff had notice that the defendant was keeping the horses, or claimed a lien upon them. The defendant having parted with the possession of the property, the lien of the mortgage is superior to his. Continuance of possession is indispensable to the existence of a lien at common law, and the abandonment of the custody of the property, over which the right extends, divests the lien. The lien holder in such case is deemed to surrender the security he has upon the property and to rely on the personal responsibility of the owner; but a sale of the property by the owner, while in possession of the property holding it under the lien, will not divest it, because the purchaser takes it subject to the

incumbrance. 3 Parsons on Contr. (5th Ed.), 243. A mortgage of chattels conveys the legal title to the mortgagee. But in this case there is no proof showing the defendant's right to enforce his lien as against the mortgagee. The judgment of the district court is therefore reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

JOHN F. CLOPPER AND JONAS GISE, PLAINTIFFS IN ERROR, v.
ALFRED POLAND, AND OTHERS, DEFENDANTS IN ERROR.

1. **Statute of Frauds.** A promise to pay the debt of another as a part of the consideration of property purchased is an original promise and need not be in writing.
2. **Practice: HEARSAY EVIDENCE.** The admission of hearsay evidence, corroborating a witness on a material point, *held*, error.

ERROR to the district court for Douglas county. Tried below, in 1878, before VALENTINE, J., of the sixth district. The opinion states the case.

Redick & Connell, for plaintiffs in error.

Promise is void, not being in writing. Gen., Stat., 393. [Comp. Stat., Chap. 32.] Deposition of Elliott was inadmissible. And see also *Second National Bank v. Grand Lodge*, 8 Otto, 123.

Charles F. Manderson, for defendant in error, cited: *Nelson v. Boynton*, 3 Met., 402. *Shelton v. Brewster*, 8 Johnson, 376. 2 Parson Contracts, 9.

MAXWELL, CH. J.

In May, 1871, Fleury & Co. were indebted to the defendants in error in the sum of \$489.30 upon an

12	69
14	201
15	636
16	19
16	20
19	582
24	655
12	69
31	107
32	271
12	69
150	655

Clopper v. Poland.

account. Fleury & Company at that time had extensive quarries near the mouth of the Platte river, and were engaged in burning lime and quarrying stone and selling the same to parties in Omaha. At the time above stated, the plaintiffs in error purchased all of Fleury & Co.'s interest in the stone quarry and lime kiln, and the defendants in error allege in their petition, and introduce testimony tending to prove that plaintiff in error assumed as a part of the consideration for said property said debt due the defendants in error, and promised to pay the same in lime. And they testify that in May and June of that year they received from the plaintiffs in error 950 bushels of lime, worth \$279.00, upon said account, and that there is still due and unpaid thereon the sum of \$272.80, with interest from August 1st, 1871. On the trial of the cause the petition was amended so as to state the original account against Fleury & Young. A verdict in favor of the defendants in error for the sum of \$446.98 was returned in the court below, upon which judgment was rendered.

The plaintiffs in error contend that their promise is within the statute of frauds and void unless in writing. But if they assumed this debt as a part of the consideration for the quarry and lime kiln, and promised to pay the same, it thereby became their own debt. The promise if made, is an original one to pay the debt, and not a collateral promise in the nature of a guaranty. The distinction is well stated in *Nelson v. Boynton*, 3 Met., 396, where it is said: "The terms original and collateral promise, though not used in the statute, are convenient enough to distinguish between the cases, where the direct and leading object of the promise is, to become the surety or guarantor of another's debt, and those where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is to subserve

or promote some interest or purpose of his own. The former, whether made before or after, or at the same time with the promise of the principal, is not valid, unless manifested by evidence in writing; the latter, if made on good consideration, is unaffected by the statute, because, although the effect of it is to release or suspend the debt of another, yet that is not the leading object on the part of the promissors."

The debt, when the promise is original, becomes that of the promissor, and the promise need not be in writing and is not within the statute.

Second, Poland testifies in substance that at the time the plaintiffs purchased the interest of Fleury & Young, in the property heretofore described, he was present with the plaintiffs in error at the quarry, and that they agreed to assume the debt upon which this action is brought and pay the same in lime, etc. The deposition of Theodore P. Elliott, one of the defendants in error, was also read in evidence, who testified that Mr. Poland went down to the lime kiln at the request of Mr. Gise, and at that time "Mr. Poland stated to me on his return that the account was to be transferred to Clopper and Gise, but prior to his stating that to me Mr. Fleury had been in, and said that he had made arrangements with Clopper and Gise to assist him, Fleury, in his business, and said to transfer the account to Fleury & Co., which I did some time in May, supposing that this transfer was to the firm of Fleury, Clopper & Gise, who I believed composed the firm of Fleury & Co."

This part of the deposition was objected to as hearsay and as being irrelevant, but the objection was overruled and the testimony read to the jury. This conversation was had in the absence of the plaintiffs in error, and is material as tending to corroborate the testimony of Poland on a material point. It is contended on the part of

the defendants in error that this testimony was necessary to fix the dates at which the account was changed, so as to charge the plaintiffs in error on the books of the defendants in error. But that this was not its object is clearly apparent. Again it is said that the evidence is merely cumulative and could not have been considered by the jury. It is impossible for us to say what weight was given to this testimony by the jury. It was admitted as legal testimony, proper for them to consider, and we see no reason why it was not given due weight. No particular objection to the instructions has been pointed out, and it is therefore unnecessary to review them.

For the reason above stated the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

12	72
15	455
12	72
48	615

MARY A. BROTHERTON, APPELLEE, v. NOAH BROTHERTON,
APPELLANT.

An appeal will lie to the supreme court from a decree of the district court granting a divorce.

MOTION to dismiss appeal.

J. S. Miller, for the motion.

Agee & Hellings, contra.

MAXWELL, CH. J.

This is an appeal by the defendant from a decree granting the plaintiff a divorce. The plaintiff now moves to dismiss the appeal upon the ground that no appeal can be taken from such decree.

Section 24, Art. I, of the constitution, provides that

"the right to be heard in all civil cases in the court of last resort by appeal, error or otherwise, shall not be denied."

Section 675, of the code, provides "That in actions in equity either party may appeal from the judgment or decree rendered or final order made by the district court, to the supreme court of the state," etc. [Comp. Stat., 619.] This applies to all actions in equity. The court has no authority to single out any particular class and declare it excepted from the operation of the law. The evident intention of the legislature was to permit an appeal in all cases in actions in equity. And under the provisions of our constitution above quoted, every one has a right in the mode provided by law to have his case reviewed in the court of last resort. A number of divorce cases have been before this court, and the decree of the court below reversed or affirmed as seemed consonant with the evidence and law of the case. *Oades v. Oades*, 6 Neb., 804. *Callahan v. Callahan*, 7 Id., 38. *Fallen v. Fallen*, 10 Id., 144. *Brown v. Brown*, Id., 849.

The right to appeal has never, prior to this time, been questioned. A number of cases from Ohio and one from Iowa have been cited by the moving party, to show that no appeal will lie in such cases. But in our view in the cases referred a very narrow construction is placed upon the right of appeal.

Take the case of *Tappan v. Tappan*, 6 Ohio State, 65, as an example, and it is very clear that the court placed a forced construction upon that section of the statute granting the right of appeal. The court cite with approval a portion of the opinion of Lane, J., in *Bascom v. Bascom*, 7 Ohio, (2 pt.) 125, in which he says: "When a divorce is granted, upon which one of the parties contracts new relations, and a third party acquires rights, it cannot be that a process could be had to reverse a decree, the consequence of which would be the sever-

Brotherton v. Brotherton.

ance of all those new relations. Such anomalous mischief cannot be engrafted on the practice of our courts, except by clear and legislative enactment. That we feel confident can never take place."

The marriage relation should not be severed for slight and trivial causes. A party seeking a divorce should be required to bring his case clearly within the provisions of the statute. If he does so he is entitled to a divorce. If he fails to do this his action should be dismissed. Suppose the cause of complaint is adultery, but the proof fails to sustain it, yet the court grants a decree upon that ground. Has the party against whom the decree is rendered no relief? If the decree is not subject to review, it must be final and conclusive, no matter how erroneous, and a stigma cast upon the reputation of the party, without any possibility, so far as the court is concerned, of removing the same. As to the objection that the party obtaining the decree has contracted another marriage, it is sufficient to say that he has no right to contract another marriage until he obtains a final decree of divorce, and this, in case of an appeal, cannot be had until the determination of the appeal. Any other rule would allow a party to take advantage of his own wrong to perpetuate a decree that should not have been granted.

The fact that an appeal will lie affords protection against decrees improperly granted, and a remedy for what, in many cases, might be a grievous wrong. The motion to dismiss must be overruled.

MOTION OVERRULED.

Brotherton v. Brotherton.

SAME v. SAME.

Practice on appeal in divorce cases. Upon affirming a decree of divorce objection being made to the amount of permanent alimony, and the testimony being indefinite as to the amount of the income of the defendant, a reference was ordered to take additional testimony upon that point and report to the court.

APPEAL by defendant from a decree of the district court of Hamilton county, Post, J., presiding.

Agee & Hellings, for appellant.

J. S. Miller, for appellee.

MAXWELL, CH. J.

This is an action by the wife against the husband for a divorce upon the ground of cruelty. A decree in favor of the plaintiff was granted in the court below, from which the defendant appeals to this court.

It appears from the record that the parties were married in Indiana in 1846, and lived together as husband and wife until Nov., 1878, and have raised a large family. The parties came to this state in 1871, and seem to have been very poor, and the defendant appears to have provided for his wife and family as well as his circumstances would permit. But it is clear from the record that he was in the habit of using coarse and abusive language towards his wife, while she seems to have replied somewhat in the same manner. But words, no matter how violent or ill advised, afford no justification to a husband to inflict blows upon his wife. The charge of cruelty by striking his wife on two occasions, at least, seems to be fully sustained and the decree granting a divorce must be affirmed.

The court decreed alimony to the plaintiff as follows: \$50.00 to be paid May 1st, 1881, \$50.00 on the 1st day of August, 1881, \$75.00 on the 1st day of November, 1881, and \$175.00 on the 1st day of January of each year

12 75
14 186
16 456

12 75
57 192

B. & M. R. R. Co. v. Wendt.

thereafter, and decreed that such alimony should be a lien upon the s. w. one-fourth of sec. 30, t. 11, r. 5, for the payment of the same. The testimony shows this land to be worth from \$1,200.00 to \$1,500.00 and the personal property about \$400.00. A large portion of the personal property has already been disposed of to raise means to pay temporary alimony and the expenses of the action. The testimony is not clear as to the amount produced on the above land, but the alimony allowed appears to be excessive and greater than the defendant is able to pay.

The case is referred to W. L. Stark, to take additional testimony as to the amount of land in cultivation, and the amount and kind of products of said land and the value of the same for each of the years 1878, 1879 and 1880, and report the same to this court within sixty days.

DECREE ACCORDINGLY.

19	76
32	317
12	76
48	236
148	556
12	76
61	317

THE B. & M. R. R. Co. IN NEBRASKA, PLAINTIFF IN ERROR, v. FERDINAND WENDT, DEFENDANT IN ERROR.

1. **Negligence: EVIDENCE.** In an action to recover damages for the killing of an animal by a train of cars upon a railroad track, the mere fact of killing was properly held to be no evidence of negligence on the part of those in charge of the train.
2. —: **GROSS NEGLIGENCE.** In such action an instruction that—"The running of a train past, or through the streets of a city at a speed of eighteen miles an hour, would be gross negligence," there being no evidence as to the character of the particular locality distinguishing it as an inhabited or business portion of the city, held, erroneous.
3. —: —. When for want of evidence of gross negligence there can be no recovery, the jury should be so told, if requested, or a non-suit ordered.

ERROR to the district court for Douglas county. Tried below, before SAVAGE, J. The action was to recover the

value of a cow owned by Wendt, and killed by cars of the railroad in Omaha.

G. W. Ambrose, for plaintiff in error, cited *Saint Louis R. R. v. Linder*, 39 Ill., 433. *Railroad v. Parker*, 29 Ind., 471. *C. & M. R. R. v. Patchin*, 16 Ill., 198. *R. R. Co. v. Phelps*, 29 Ill., 447. *Vandergrift v. Rediker*, 2 Zab., (N. J.) 185. *C. & N. W. R. R. v. Goss*, 17 Wis., 428. *Stucks v. M. & R. R.*, 9 Wis., 213. *Clark v. S. & U. R. R.*, 11 Barb., 112. *Marsh v. N. Y. & E. R. R.*, 14 Barb., 364. *Munger v. R. R. Co.*, 4 N. Y., 349. *Williams v. M. C. R. R.*, 2 Mich., 259.

H. Stull, for defendant in error, cited *Bellefontaine & Indiana R. R. v. Snyder*, 18 Ohio State, 399. *Cincinnati & Zanesville R. R. v. Smith*, 22 Ohio State, 237. *Hoyt v. City of Hudson*, 41 Wis., 105.

LAKE, J.

By the judge's charge the jury were explicitly and very properly told that "the mere killing of the cow" was "no evidence of negligence." The fact that the cow had been killed by a moving engine of the company, at the time and place charged, being admitted by the answer, the only material testimony given upon the trial on this point was as to the speed of the train at the time of the accident. This, according to the complainant's witnesses, was somewhere between twelve and eighteen miles an hour, while those of the company placed it at not to exceed eight.

That this conflicting testimony as to the velocity of the engine when it struck the cow was, in the mind of the judge, the pivotal point on which the decision of the jury must turn is apparent, for in referring to it, he said: "The running of a train past, or through the streets of a city, at a speed of eighteen miles an hour would be gross negligence.

The running of a train at eight miles per hour, or at such other moderate speed as is necessary and customary, in order to carry on and do the business of the defendant company, was not such gross negligence. The question is then mostly confined to the point of the speed at which the train was running at the time of the accident."

The cow was killed within the corporate bounds of the City of Omaha, between Pine and Chestnut streets, "about two blocks" from the residence of the defendant in error, and a short distance from "Boyd's packing house." Aside from the business being done by the railroad company, this was all that was disclosed on the trial as to the character of that particular locality to distinguish it as an inhabited or business part of the city. Such being the case, there was no ground even for the jury to have found, as matter of fact, that a speed of eighteen miles an hour, the highest rate testified to, was at all unusually dangerous, much less for the court to charge, as a matter of law, that it was "gross negligence."

In this sort of action, whether the injury be done with or without a city, doubtless the rate of speed may be of great importance in determining whether there was in fact negligence on the part of those in charge of the train, and responsible for its movements; but speed alone, unconnected with any other fact or circumstance, and more especially where it is not shown to have been unusual, has never, that we are aware of, been held sufficient to show gross negligence. Besides, it must be apparent upon the slightest reflection that no arbitrary rule as to the rate of speed at which a train of cars may not be run, with due regard for the safety of persons and property, can be applicable to all portions of a town or city alike. Evidently a rate which in one portion, or under certain circumstances might be entirely reasonable, in another and more thickly inhabited portion, or under different circumstances, would very justly be deemed unwarrant-

able, and evince a most reckless disregard for the rights, both of persons and property.

As showing that speed alone, even although it be at an unlawful rate, is not sufficient to fix a liability for an injury, the case of *Brown, Admr. v. The Buffalo and State line R. R. Co.*, 22 N. Y., 191, is in point. That was an action for damages caused by the killing of the plaintiff's intestate at a street crossing in the city of Buffalo. It appeared that there was an ordinance prohibiting the running of trains within the city faster than a certain rate, with a fixed penalty for exceeding it. On the occasion of the injury complained of, the speed of the train was greater than the ordinance permitted, and the court charged the jury that this fact alone constituted negligence on the part of the railroad company, for which it was liable, if the intestate were himself without fault. This instruction the court of appeals held to be erroneous, and ordered a new trial. See also on this point *C. O. R. R. Co. v. Lawrence*, 13 Ohio St., 66.

Another instruction given at the request of the defendant in error, we consider erroneous, in view of the conceded facts of the case. It is as follows: "If the jury shall find that the killing was done by the defendant's employees at the time charged in the petition and through the negligence of the defendant's employees, then the plaintiff must recover, unless the jury also find that the plaintiff was guilty of contributory negligence."

The judge of his own motion had already told the jury that if "the plaintiff permitted his cow to stray upon the railroad track in question" and while so straying received the injury, "then the plaintiff was guilty of contributory negligence, which would preclude his recovery, unless the defendants were guilty of *gross* negligence, which caused the injury." And in this connection gross negligence was defined to be "the want of ordinary care." The fault to be found with this charge is, first, that it submitted to the jury

the question of gross negligence on the part of the railroad company, of which there was, as we have seen, no evidence whatever; and, secondly, the question of contributory negligence on the part of the owner of the cow, of which there was no doubt, he having himself testified to the very state of facts which the judge said would amount to contributory negligence, viz: permitting his cow to stray upon the railroad track, which she did on the occasion of the injury.

Turning to the testimony of the defendant in error, on this point, we find the following: "I lived about two blocks away from where she was killed. She had not been in the habit of running on this ground to feed. I fed her at home. She was turned out that morning. I believe my boy turned her out, and gave her water outside. She was turned loose for water. We did that every morning. Sometimes we have a well there, but there was not, all the time, water enough in it to give water to the cow. The tracks was between my house and the river. She had to cross these tracks to get to the water. * * * I did not have anybody to watch her, only the boy sometimes. This time she was within two blocks of the house, and the boy came in to get his dinner. * * * I told the boy to watch her, and I don't know whether he was watching her or not. At the same time it happened, we was eating our dinner, and the boy was eating dinner too. All the family was in the house."

Thus it was conclusively proved by the testimony of the owner of the cow himself, that, knowing full well the great risk he ran in so doing, he actually turned her loose in the immediate vicinity of these railroad tracks, and left her to wander unattended and uncared for whithersoever she would. Such being the unquestioned facts before the jury respecting the owner's negligence, and there being, as we have shown, no evidence of *gross* negligence on the part of the railroad company, the first instruction

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requested on behalf of the plaintiff in error, viz: that on "the evidence adduced on the trial, there could be no recovery," ought to have been given, or a non-suit ordered. There was nothing for the jury to pass upon. For these reasons the judgment must be reversed and a new trial ordered.

REVERSED AND REMANDED.

MAXWELL, CH. J., dissenting.

This is an action brought by Wendt against the railroad company to recover the value of a cow belonging to him, which was killed by a locomotive of the defendant, while making a running switch near Boyd's packing house, in the city of Omaha. The petition is framed upon the theory that there can be no recovery in such case except for gross negligence on the part of the railroad company, and the rulings of the court and instructions given were all based on that view of the law. A verdict for \$33.50 was returned in favor of Wendt, upon which judgment was rendered. The company bring the cause into this court by petition in error.

That there are sufficient errors in the record to justify a reversal of the case on behalf of Wendt, had he laid the proper foundations for a review, there is no doubt. But he makes no complaint. As the statute does not require a railroad company to fence its tracks within the limits of a city or village, it is not responsible for injury to domestic animals caused by its trains within such corporate limits, unless it has been guilty of negligence. One object of a railroad is the transportation of persons and property at a high rate of speed by means of engines and cars, and this must necessarily be dangerous to cattle going upon the track. To lessen this danger, all railroads in this state which have been in operation six months, are required to fence their track, except within the corporate limits of a city or village, and the failure

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to do so will make them liable in any event for stock injured on that part of the road required to be fenced, while at crossings and such portions of the track as are within the limits of a city or village, they are liable for want of ordinary care.

It may be conceded that a railway company has a right to regulate the management and conduct of its business with reference to the security of persons and property in its charge and the meeting of reasonable appointments in regard to them, and that such company need not presume that cattle will be permitted to stray upon the track. It will also be conceded that the company has a right to the exclusive use of its track, precisely the same as the owner of a farm has to its free use and enjoyment. But a railroad must necessarily be crossed at short intervals by public roads, upon which the public have a right to travel, and within the limits of a city is necessarily crossed by many public streets, and as the business of running cars is particularly dangerous to those crossing such roads and streets, great care should be required of those having the management of trains. And the law will not permit the company to commit an injury to stock of another straying upon the track, which may be avoided by the exercise of ordinary care.

In the case of *C. & Z. R. R. Co. v. Smith*, 22 Ohio State, 244, an instruction that "the defendant had the right to the free and unobstructed use of its railroad track, and that the paramount duty of its employees was the protection of passengers and property in the trains, and the trains itself; but this being their paramount duty, they were bound to use ordinary care and diligence so as not unnecessarily to injure the property of others," was held correct. See also *Ill. Cent. R. R. Co. v. Mid-dleworth*, 46 Ill., 494. *Bemis v. Conn.*, 42 Vt., 875. *Ishul v. N. Y. R. R. Co.*, 27 Conn., 393. This is undoubtedly

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a correct statement of the law, although there are decisions that seem to hold that stock straying upon the track may be killed with impunity. The maxim of the law is, "enjoy your own property in such manner as not to injure that of another person." This applies to all owners of property.

There is sufficient in the record to show that quite a number of people witnessed the accident, and in my opinion there is a clear preponderance of the evidence showing that the engine was run at a speed of eighteen miles per hour. The accident seems to have been caused by the high rate of speed at which the locomotive was running, and such being the case the court was justified in its instruction that eighteen miles per hour at that point would be gross negligence. If this was not a thickly settled portion of the city, it devolved on the defendant below to show that as a matter of defense. The court below permitted the jury to deduct the value of the carcass of the cow killed, although Wendt made no use of the same. It is pretty clear that this deduction was unauthorized by the law. In my opinion Wendt is entitled to a larger judgment than he recovered, but as he does not complain, and as substantial justice has been done, the judgment should be affirmed.

ELIZABETH STEVENSON, PLAINTIFF IN ERROR V. MONS ANDERSON, DEFENDANT IN ERROR.

1. Practice in County Court. A motion to require the plaintiff to itemize his account comes too late if filed after an answer to the merits, and may be overruled on that ground.
2. —: DEPOSITIONS. When error is assigned upon the refusal of the court to suppress and exclude depositions as evidence, to have a review of the ruling, it is necessary that such depositions be included in the record.

12	83
17	98
19	215
14	83
56	362

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3. —: JURY TRIAL IN COUNTY COURT. In the county court, to entitle a party to a jury trial, in actions where the amount claimed exceeds one hundred dollars, he must demand it, in writing, on or before the filing of the answer.
4. —: OBJECTIONS TO EVIDENCE. In objecting to the admission of evidence, the ground of objection should be stated, or it will not avail.

ERROR to the district court for Hall county, the cause having been brought there on error from the county court, and its judgment affirmed by Post, J.

Abbott & Caldwell, for plaintiff in error, contended that plaintiff was entitled to a jury trial; *Mills v. Miller*, 3 Neb., 94; *Lamaster v. Scofield*, 5 Neb., 148; that section 13, of act relative to practice in county courts (referred to in opinion,) was unconstitutional. *White v. City of Lincoln*, 5 Neb., 505. *St. Paul & Sioux City R. R. v. Gardner*, 19 Minn., 132. *Norval v. Rice*, 2 Wis., 22.

Thummel & Platt, for defendant in error.

LAKE, J.

This is a petition in error prosecuted to reverse the judgment of the district court for Hall county, affirming a judgment of the county court. The questions presented for our determination therefore are, whether in the matters complained of in the district court the county court erred.

Taking them in the order of their presentation to the district court, the first error complained of is the refusal of the court to require "the plaintiff to itemize his account, filed and marked exhibit C." In this particular the record shows no error. In the first place the motion came too late. It was filed on the 18th of July, 1879, after the issues of fact had already been completed by answer to the merits. In the second place, even if it had been filed in season, there was no necessity shown for the required

order. The last clause of section 125, of the code of civil procedure, which is applicable to the practice in county courts, in what are called term cases, or those wherein the amount claimed exceeds the jurisdiction of a justice of the peace, provides that "where the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."

This provision is, of course, for the benefit and protection of defendants and plaintiffs alike, and to enable them to know just what is demanded by the opposite party, and it should be enforced in all proper cases. Where, however, the party against whom a claim is made, is already so fully advised by the pleading of its nature as to be able to answer it intelligently, there is no reason for resorting to it, and to do so would be but a mere matter of form, and without the least benefit whatever. In this case no reason was shown for making the motion, and it was properly overruled on that ground also.

The second, fifth and sixth errors assigned, relate to the depositions of sundry witnesses, and may be considered together. The substance of these assignments is, that the depositions in question ought to have been suppressed, and excluded from the consideration of the court in its finding upon the issues of fact. From the transcript of the proceedings in the county court brought here it is impossible to ascertain whether the several rulings upon these depositions were correct or not. All that appears is a brief recital that the depositions were filed, a motion to suppress, and an objection to their being read on the trial, both of which motions were overruled, and exceptions taken. Neither the depositions nor any portion thereof, nor the grounds of objection thereto are given, so that we are without the means of knowing the particular points relied on, or judging of the merits of decisions

complained of. In the absence of evidence to the contrary the presumption is that the trial court ruled correctly; and it is the duty of him who complains that prejudicial error has been committed, to show it by the record.

The third error complained of is the refusal of the court to call a jury for the trial of the cause, as requested by the defendant. The transcript shows the request for a jury to have been made on the day of trial, and after the issues had been completed. The ground for refusing this request was, that it came too late.

In the act relating to county courts, Sec. 13, Chap. 20, Comp. Statutes 207, we find a very peculiar provision bearing on this subject. It is in these words: "Either party may demand a jury for the trial of any cause pending in the probate (county) court, wherein the amount claimed exceeds one hundred dollars; but such demand must be made in writing, and entered on the docket, on or before the filing of the answer in such cause." Under this provision, the ruling of the county judge, that the demand for a jury was too late, must be upheld.

The fourth assignment is, that: "The court erred in allowing said plaintiff to offer in evidence (*give* in evidence, we suppose was intended) ex. A. B. & C., filed with plaintiff's petition to support said petition." The record merely shows that the defendant objected to the introduction of this evidence without stating any reason for the objection. This omission is fatal, for we cannot know the merits of the objection, and must hold therefore that the court ruled correctly.

There is no error in the record, and the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

HYMAN HALLO AND ROCELIA PALMER, APPELLEES, v. LOUIS
HELMER, TREASURER OF LANCASTER COUNTY, AND CHARLES
P. DEWEY, APPELLANTS.

1. **Taxes: ASSESSMENT OF LAND FOR TAXATION: OATH OF ASSESSOR: INJUNCTION.** It is essential to a valid assessment of land for taxation that the assessor take and subscribe an oath, as directed by sec. 12, ch. 66, Gen. Statutes. But the oath being made and returned with the assessment roll, the mere fact that it was not "*attached*" thereto is no ground for enjoining the execution of a tax deed.
2. —: **RAISING ASSESSED VALUE: NOTICE OF.** Where the value of property as returned by the assessor as to an entire precinct or tax district is relatively too low, it may be raised by the board of equalization, without notice previously given to property owners.
3. —: **TIME OF LEVY.** The fact that city taxes were levied after the usual time, or later than they ought to have been, there being no act of limitation, is not a ground for enjoining tax proceedings.
4. —: **EXEMPTION FROM: CONSTITUTIONAL LAW.** By an ordinance of Lincoln, a city of the second class, the lots in controversy were in terms specially exempted from municipal taxation for a term of years. Afterwards in 1875, this ordinance, by a special act of the legislature, was "declared to be legal." *Held, first*, that the ordinance was void, it being in conflict with a provision of the act for the incorporation of cities of the second class requiring that taxes for city purposes be levied "on all real, personal, and mixed property * * * taxable according to the laws of the State of Nebraska," said lots being so taxable. *Second*, that, as a general rule, defects in tax proceedings cannot be cured where there was a lack of jurisdiction to take them. *Third*, that the act declaring said ordinance valid was void for being in conflict with Sec. 1, Art. 8, of the Constitution of 1866, which provided that "The legislature shall pass no special act conferring corporate powers."

APPEAL by defendants from a decree rendered in the district court, by POUND, J., confirming the report of S. J. Tuttle, referee, and perpetually enjoining the defendant

12	87
13	23
14	585
16	449
12	87
35	679
12	87
55	153
12	87
37	685

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treasurer from executing a tax deed to certain property of plaintiffs, etc.

Burr & Kelly, for appellants.

1. Only one assessor's oath is required. Sec. 12, Chap. 66, Gen. Stat., 2. The board had power to raise assessment 20 per cent. *Dundy v. Richardson County*, 8 Neb., 516. Law of 1875, and the ordinance of city exempting this property, were void. *Hurford v. Omaha*, 4 Neb., 336. *Fletcher v. Oliver*, 25 Ark., 289. *Clegg v. School District*, 8 Neb., 178. *Washburn College v. Shawnee County*, 8 Kan., 344.

Emil Schultz, for appellee Hallo, and *A. L. Palmer*, for appellee Rocelia Palmer, (*E. E. Brown* with them.)

1. Assessment of real property, the assessment roll not having oath of assessor attached, is void. *Morrill v. Taylor*, 6 Neb., 236. *Lynam v. Anderson*, 9 Neb., 375. 2. Referees finding is that neither notice was given to plaintiffs, nor was any testimony heard before the board. This made the increased valuation and the assessment and levy based thereon void. *Dundy v. Richardson County*, 8 Neb., 515 and 516. *South Platte Land Co. v. Buffalo County*, 7 Neb., 253. Cooley on Taxation, page 541. *Sioux City & P. R. R. v. Washington County*, 3 Neb., 43. *Lammers v. Nissen*, 4 Neb., 253. *Jones v. Commissioners*, 5 Neb., 564. *Avery v. East Saginaw*, 7 N. W. R., (177). S. C., 44 Mich., 537. 3. The ordinance which appellants contend is void, simply exempted these lots from the payment of these taxes, without increasing anybody else's taxes. The council, by said ordinance simply took the amount of these taxes, and turned them over to the appellee, Hallo, for a good and valid consideration, to-wit: The erection of a "building seventy-five by ninety feet, with a stone foundation and brick superstructure, the upper story of which is to be finished into

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a hall suitable for a——city hall, and to be twenty-two feet between joists, said building to be completed on or before the first day of August, A. D., 1878." This is declared by said ordinance to be a contract between the city of Lincoln and the said H. Hallo. See Laws of 1875, page 319. The city authorities had the power to make such contract. Gen. Stat., page 138, Sec. 6, subdivision 4. Id., Sec. 31, XII., XXI., XXXIII. See also Cooley on Taxation, 322. *Nebraska City v. Gas Company*, 9 Neb., 344. *Grant v. City of Davenport*, 26 Iowa, 396.

LAKE, J.

This action was brought to enjoin the execution of a tax deed to three lots in the city of Lincoln, on the ground of the illegality of the taxes for which they were sold.

In the district court the case was sent to a referee, who found all of the material facts on which the relief was sought in favor of the plaintiffs, and recommended a decree accordingly, which was rendered. Therefore the material inquiry here is whether the facts alleged, and found by the referee, entitle the plaintiffs to the judgment which the court rendered. Referring to the petition, these facts are found to be. 1st. That the assessment was invalid for the reason that the assessor did not take and subscribe an oath, and attach the same to the assessment roll, as required by Sec. 12, Ch. 66, Gen. Statutes. 2d. That the county commissioners, as a board of equalization, without notice to the plaintiffs, increased the valuation of all city property, as returned by the assessor, twenty per cent., as a basis for the levy of taxes for the year 1875. 3d. That the assessment for, and the levy of, city taxes for said year were not made until about the 16th of July, whereas they should have been made much earlier. 4th. That a portion of the taxes for which said lots were sold were

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for city purposes, and it is contended that these were illegal for the reason that they were levied in violation of a certain ordinance of the city, which in terms had exempted said lots from all such taxes from the year 1878 to 1877, inclusive, in consideration of certain private valuable improvements made thereon, which ordinance had been formally ratified and confirmed by an act of the state legislature. If these facts entitled the plaintiffs to the relief prayed, then the judgment of the court below is right and must be affirmed, but otherwise it must be reversed, and the case dismissed for want of equity.

It should be borne in mind that this is an action which must be governed by equitable principles; and the success of the plaintiffs depend upon the bringing of their case within some one of the rules of equitable cognizance. In such an action, a showing which, possibly, might be successful against the holder of a tax deed, in an action for the recovery of the land, may be totally inadequate as a ground for affording affirmative relief of the character here sought.

As to the oath which the statute requires the assessor to attach to his return of property for taxation, and the want of which is made the first ground of complaint, it appears that instead of uniting real and personal property, as the statute evidently contemplates, he kept the two kinds separate, thereby making, nominally, two parts of what should have been in form, as it was in legal effect, but a single assessment roll. To that part containing the list of personal property the required oath was actually *attached*, but to the other there was none. And this circumstance alone, it is now insisted, renders the assessment, and consequently the levy of taxes as to the realty, absolutely void. But we think this result does not follow. Such a ruling would be much too technical. Without the least doubt the oath which the

assessor made and attached to one division of his return was intended by him, as its terms, fairly construed, really import, to apply to his entire assessment for that year, and to cover all of his official duties under the law. This being so, suppose for instance, that it had not been attached to either of the two parts, but instead simply returned with them, and filed in the proper office, would the entire assessment have been vitiated, and the taxes depending thereon uncollectible? In no case, as yet, has this court gone so far as that, and we could not so hold with our present understanding of the law.

It must be conceded that in *Morrill v. Taylor*, 6 Neb., 236, language is used from which, perhaps, it may be reasonably inferred that this court approved the doctrine that an actual corporeal attachment of the oath to the assessment roll is essential. That was a case in which the purchaser of a lot at tax sale having taken possession thereof, sought to defend it by his tax deed against the delinquent owner, in an action of law for its recovery. On the trial two very important facts stood undisputed—in fact conceded; 1st. That no assessors oath was attached to the assessment returns; and 2d., that the county clerk having made due search could find none in his office, the place where they ought to have been, if ever made, and then in existence. In addition to this search, no effort was made on the trial, nor was there anything in the case tending to show that the required oath had in fact been taken. From such evidence it was a legitimate inference, doubtless, that the assessor had neglected his duty in this particular, and so the court held.

It is apparent from this that the facts upon which that case was decided were quite different from those of the one now before us. In that, according to the evidence, no oath was in fact taken. In this, not only was one

taken in due form, but it was returned with, and actually attached to one section or part of the assessment roll. There the court was not called on to decide what would be the effect of an oath really taken, returned with, but not attached to the roll, but merely as to the consequence of omitting the oath altogether. As to the necessity of the oath, this language was used in that case, and we now repeat it as a sound statement of the law: "It seems to us very clear, both upon principle and authority, that a substantial compliance with the requirements of the statute prescribing the oath to be taken and subscribed by the assessor, is an essential pre-requisite—a jurisdictional fact—that must exist before the board of commissioners can exercise any power in the taxation of property, and that without such oath there is in law no assessment." Clearly as there was "in law no assessment," of the lot there in dispute, neither was there any warrant for the levy of taxes upon it, and consequently no authority for the tax sale under which the defendant there claimed ownership, and a right to the possession he was defending. It is clear, therefore, that the decision in that case is by no means decisive of the point raised in this one as to the legality of the assessment.

Without now determining what our holding would be in an action for the possession of the land under a tax deed resting on an assessment in the condition of this one, we are fully satisfied that in a proceeding to enjoin the collection of a tax, or as here, the execution of a tax deed, this irregularity respecting the oath is not sufficient to warrant the court in interfering. There is at least a formal assessment, and no complaint that it is unjust. Every step that the statute requires in making it, save the actual attachment of the oath to that portion of the roll containing the description of real property, was taken, and following our decision in *Lynam v. Anderson*, 9 Neb., 867, we must hold that this failure to attach the

oath furnishes no just ground of complaint. A formal assessment, even if it do not in every respect conform precisely to the requirements of the statute, will, in an equitable proceeding, support a levy of taxes, otherwise legal. *South Platte Land Company v. Crete*, 11 Neb., 844. And on this point see also *Wood v. Helmer*, 10 Neb., 65.

The second point, that the county commissioners raised the valuation without notice to the plaintiffs is fully met by our decision in the case of *Dundy v. Richardson county*, 8 Neb., 508. We there held that where the assessment of property in one district is relatively too low, it may be raised by the board of equalization without notice to the owners. The showing here is that the increase was general, applying to all city property, wherefore the inference is that, in the opinion of the commissioners, the valuation as returned by the assessors within the city was too low, and that the increase was essential to a just equalization. Their action in this particular is clearly within the rule of the case referred to.

As to the third point, that the levy for city purposes in 1875 was made somewhat later than usual, or perhaps than it ought to have been, we believe very little if any reliance was placed thereon by counsel in argument. At all events there is no equity in it. There was nothing that we are aware of to hinder the city council, if they saw fit, from making the levy as late as the month of August, the time charged in the petition, or even as late as the 20th of November, as found by the referee. By the act under which the city was incorporated ample authority was conferred upon the corporation to levy and collect taxes for revenue purposes, and without any direction or restriction as to when it should be done. There is no merit in this point, and we pass it without further comment.

Apparently the most serious objection urged to this tax sale is the fact that it was in part for a tax levied in vio-

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lation of an agreement, as before stated, on the part of the city, by ordinance, to exempt these lots for a time from taxation for municipal purposes. In reality, however, the question thus raised is a very simple one, and derives its chief importance from the fact that this formal exemption was afterwards, by an act of the legislature, approved February 25th, 1875, "declared to be legal." This act of legalization implies of course that until then the ordinance was illegal. And so without any doubt it was. The corporate authorities of Lincoln derived all of the powers they possessed or could lawfully exercise over the subject of taxation from the state legislature through the act of incorporation. Referring to that act, which was approved March 1st, 1871, we find, as before stated, that the power to tax is given under certain restrictions, one of which is that the levy must be "on all real, personal and mixed property, within the limits of said cities, *taxable according to the laws of the state of Nebraska.*" From this we see that the power of determining upon what property city taxes shall be laid is purposely withheld from the corporate authorities, and to ascertain whether any particular species or article is either taxable or exempt, resort must be had to the general revenue law of the state, and not to city ordinances. Under the state laws, these lots were not exempt from taxation.

This formal exemption, or agreement to exempt, being therefore illegal, and of no effect, did the act of the legislature cure the defect? In an able work on taxation it is stated as a general rule, that defects in tax proceedings "cannot be cured when there was a lack of jurisdiction to take them." Cooley on Taxation, 227. The ordinance in question having been passed without authority, and in defiance of the provision in the act of incorporation above referred to, is within this rule.

Back of this, however, there is quite as formidable, and still more radical reason why no advantage can flow from

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this action of the legislature. The agreement to exempt these lots from taxation was, as we have shown, an assumption of a corporate power. And the power of exemption, in any case, by the city government, like the power of taxation, could come only from the state through a legislative grant. Under the constitution, such a grant could have been made only by a general law, applicable to all cities of the same class. "The legislature shall pass no special act conferring corporate powers." Sec. 1, Art. 8, Cons. 1866. Under this restriction of the supreme law, could the legislature by a special act, applicable to the city of Lincoln alone, have authorized the local government to determine what property should be taxed, and what exempt from taxation? Clearly not. And if this power could not have been thus directly given prior to its assumption, could it be afterwards, indirectly, as was here attempted, by a special act of legalization? That it could, cannot, we think, be seriously contended for by any one. To so hold would be a palpable disregard of a most important and very plain provision of the constitution.

For these reasons we are of opinion that the facts alleged in the petition, and found by the referee, make no case for equitable relief. The judgment, therefore, must be reversed at the costs of the appellees.

REVERSED.

AUGUST KOPPLEKOM AND OTHERS, PLAINTIFFS IN ERROR,
v. LEMUEL HUFFMAN, DEFENDANT IN ERROR.

1. *Sheriff's Bond.* An official bond given by a sheriff ran to "the people of the State of Nebraska," while the statute required it to run to the county for which he was elected. *Held*, that this was a mere irregularity of which neither the sheriff, nor his sureties, could take advantage, in an action upon it.

12	95
16	359
18	635
18	118
20	245
12	95
30	550
12	95
34	609
12	95
44	753
12	95
53	775
55	144

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2. **Pleading: PROOF: VARIANCE.** Certain errors having been made by the pleader in copying a portion of the instrument sued on into the petition, on the trial the introduction of the original in evidence was objected to on that ground. *Held*, that, inasmuch as it did not appear that the variance could have prejudiced the objector, the instrument was properly admitted.
3. **Charge to jury.** Where instructions to a jury are requested which are substantially covered by the charge as given, the refusal to give them is not error. One full and clear instruction upon a given point is enough. Instructions examined and, as given, found to state the law correctly.
4. **Arrest: ESCAPE FROM.** Before an officer can lawfully resort to extreme measures—such as shooting—to prevent an escape from an unauthorized arrest for felony, he is required to exercise a high degree of care and diligence in ascertaining whether he has the right man.
5. **Preponderance of evidence.** In an action against a sheriff and his sureties upon his official bond for an injury occasioned by negligently making an unauthorized arrest, the issues are to be determined by the preponderance of evidence, as in other civil cases.
6. **Negligence a question for the jury.** Where in such an action the acts complained of were admitted, and sought to be justified as having been necessary in the proper discharge of official duty, and the material inquiry being as to the alleged negligence, this is a question peculiarly for the jury, and if there be evidence to support their finding it will not be disturbed.

ERROR to the district court of Dodge county. Tried below, before Post, J. The case came here in 1879, and is reported 8 Neb., 344. Verdict and judgment in favor of plaintiff Huffman.

Marlow & Munger and *E. F. Gray*, for plaintiff in error.

1. Bond admitted in evidence is not identical with that set out in petition. The variance is fatal. 1 Greenleaf Ev., sec's 56, 58 and 66. 2 Id., sec's 11 and 160.

2. Bond is void because it differs from the statutory requirements in several respects. Gen. Stat., 99. *Saxson v. Kelley*, 3 Neb., 104. *Cutler v. Roberts*, 7 Neb., 18.

Silzer v. Governor, 4 Blackf., 15. *Jackson v. Simonton*, 4 Cranch C. C., 255. *Howard v. Brown*, 21 Maine, 385.

4. Under the evidence, we contend that the plaintiff below was properly arrested and knew he was in the hands of an officer, charged with a felony and breaking jail; and that his resistance and whole conduct was calculated to confirm the sheriff in the belief that he had found the escaped felon.

It is clearly established by proof, that Koppelkom had reasonable grounds to believe that the plaintiff was the escaped prisoner and did so believe, at the time of the arrest and shooting of plaintiff; and that the sheriff acted without malice, in good faith, and upon reasonable grounds, is not controverted by any fact or circumstance in the case.

The arrest and shooting must, therefore, be viewed in the same light as though it actually had been Clark that was arrested, broke away, and shot to effect his recapture. And we think it will not be questioned but what, had it been Clark, instead of Huffman, the shooting would be justified. That Clark in that case could not maintain this action. It is a well established rule of law, that a sheriff, upon reasonable grounds of suspicion that a felony has been committed, may make an arrest of the suspected party without warrant, and will be justified, though it turn out that no felony was in fact committed, or that the suspected party is in fact not the guilty party. *Burns v. Erben*, 40 N. Y., 468. *Rohan v. Sawin*, 5 Cush., 281.

Marshall & Sterett, for defendant in error.

1. There was not on the trial any claim or proof that defendants were misled to their prejudice by immaterial variances between the allegation and proof. Civil Code, sec. 138.

2. The alleged invalidity was settled in 8 Neb., 347.

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3. In answer to the fourth point in plaintiff's brief we cite *Mix v. Clute*, 3 Wend., 350. *Gwynn on Sheriffs*, 100, 552. *Wharton on Homicide*, sec. 245. *Hoye v. Bush*, 1 Man and Granger, 775. *Commonwealth v. Crotty*, 10 Allen, 403. *Case v. Hart*, 11 Ohio, 368. 1 Bishop Crim. Law, sec. 868. 1 East Pleas Crown, 328.

4. Defendant sureties are liable upon the bond for the wrongful acts of sheriff. *Van Settler v. Littler*, 14 Cal., 194. *People v. Schuyler*, 4 Com., 173. *Ohio v. Jennings*, 4 O. S., 423. *Kane v. U. P. R. R. Co.*, 5 Neb., 107. *Com. v. Stockton*, 5 Monroe, 129. *Jewell v. Mills*, 3 Bush., 6. *Forsyth v. Ellis*, 4 J. J. Mars., 299. *Com. v. Reed*, 3 Bush., 516. *Cormack v. Com.*, 5 Binney, 184. *Com. v. Cole*, 7 B. Monroe, 250. *Lowell v. Parker*, 10 Met., 309. *Greenfield v. Wilson*, 13 Gray, 384. *Skinner v. Phillips*, 4 Mass., 75. *Rollins v. State*, 13 Mo., 487. *Harris v. Hanson*, 11 Maine, 241. *State v. Fanning*, 21 Mo., 160.

LAKE, J.

The first five of the alleged errors relate exclusively to the official bond on which the action was brought. That the plaintiffs in error, as principal and sureties, actually executed an official bond for Kopplekom as sheriff, is not denied by the answer. The statements on this point are evasive. In effect, the denial is simply that they never "made their writing obligatory, as copied and set out in said petition;" and that the instrument "as mentioned and described in said petition," was never "approved according to law." An effort seems to have been here made by the pleader to take advantage of an evident clerical error in the wording of the bond itself, and also in copying it, by which certain words were omitted, or used, which ought not in strictness to have been. For instance, by the terms of the bond, as made, it runs to: "The people of the State of Nebraska," whereas it should have run to Dodge county, as the statute provides. This irregu-

larity, however, cannot be taken advantage of by the sheriff or his sureties as we held in *Huffman v. Kopplekom*, 8 Neb., 344. Again, in copying a portion of the bond into the petition, the clause, "and these presents are upon this condition," between the last two words, the term "express" is inserted in the copy. And by still another error in copying, the phrase, "according to law and the best of his ability," is given as being, "according to law, and to the best of his *skill* and ability."

These variances could not possibly have misled, or in the slightest degree prejudiced the plaintiffs in error. They were therefore properly treated by the court as immaterial. "No variance between the allegation in a pleading and the proof is to be deemed material, unless it have actually misled the adverse party to his prejudice, in maintaining his action or defense upon the merits." Sec. 128, code of civil procedure. It is not even claimed that these parties were misled; therefore, there being no merit in the objection, the bond was properly admitted in evidence.

The next objection in order is that made to the testimony of the witness Lang, "that August Kopplekom was sheriff of Dodge county." Had it been necessary to prove that Kopplekom was then sheriff, the testimony of this witness would have been pertinent and proper for that purpose. But, under the pleadings, this proof was superfluous, for, by the answer, it stood admitted that he was such sheriff, and that while in the lawful discharge of his official duty, he did the act complained of. Indeed, the injury to Huffman is sought to be justified on the sole ground that it was done in the lawful attempt to arrest him under the honest belief that he was really an escaped prisoner, charged with a felony.

A very large number of errors are alleged respecting the rulings of the court upon the admissibility of evidence. We have examined the bill of exceptions with care

respecting this complaint, and noted the several points on which reliance is placed for a reversal, but fail to find anything to which exception could be justly taken. The several rulings of the judge in this particular seem to have been entirely fair throughout, and, as to the plaintiffs in error, quite as liberal as was possible. The alleged errors in this respect must, therefore, be overruled, and we pass them without further comment.

It is also claimed that errors were committed in the charge to the jury, both in refusing certain instructions requested, and in giving others to which exceptions were taken. As to those requested, which the judge refused, being two in number, we need only say that the substance of the ruling thus sought was fully included in an instruction which the court gave in far more appropriate terms, and with especial reference to the testimony by which the sheriff sought to justify his conduct on the occasion of the attempted arrest. Having fully covered the ground, by the charge as given, it was not error to refuse requests covering the same ground, and differing, not in substance, but in phraseology only. One full and clear instruction upon a given point is enough.

The instructions given, which are complained of, are four in number. In substance they were as follows:

First. That if the jury found for the plaintiff (defendant in error) they should assess his damages at such sum as they might believe him entitled to, "from a full and fair consideration of all the facts and circumstances in evidence before them touching the injury complained of." That the amount allowed "should be such sum as will compensate the injured party for such loss of time, physical pain, and mental distress as are fairly and reasonably the plain consequences to him of the injury;" that if the jury found the injury to be "permanent, then in fixing the amount of damages they should take into consideration the nature and extent of the injury in, all its

fair and reasonable consequences, and include future as well as present disability."

Second. That if the jury found that Kopplekom shot and broke the plaintiff's leg, and at the time of doing so, "had a writ of mittimus for the custody of the escaped prisoner Clark, but that he had no other process for the arrest of the plaintiff; that the defendant Kopplekom did arrest and take the plaintiff into his custody, as such sheriff, and against the wish and consent of the plaintiff; that the plaintiff broke loose from the arrest and custody of the defendant Kopplekom, to effect his escape therefrom; that the shooting and injury was done to prevent the plaintiff from escaping, and freeing himself from said arrest and custody; that the defendant mistook the plaintiff for the escaped prisoner Clark. Yet if the jury further find that said defendant Kopplekom might by the exercise of due care and diligence have ascertained that the plaintiff was not said Clark, then the jury will find for the plaintiff."

Third. That, "before an officer can resort to extreme measures to prevent an escape from an unauthorized arrest, he should exercise a high degree of care and diligence in ascertaining whether he has the right or wrong man."

Fourth. That in finding their verdict the jury should be governed by the "preponderance of evidence."

As to these four instructions we will only add that they undoubtedly state the law correctly, and the exceptions to them must be overruled. Under the pleadings the real question in issue was simply whether in what he did in and about the arrest, and attempted detention, of the defendant in error, he was wanting in that reasonable care and caution which is due to the safety and rights of the innocent. That question was properly presented to the jury by the charge, and we see no reasonable ground of complaint in anything that the court did.

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The substance of the remaining objections to be considered is as to the finding of the jury upon the facts. Finding no error either in the admission of evidence, or the instructions of the court, the only remaining inquiry for this court is simply whether, from the facts and circumstances detailed before them, the jury were warranted in finding that the great and permanent injury done to the defendant in error was the direct result of negligence on the part of the sheriff in the discharge of official duty. The fact that the act complained of was done in the discharge of official duty is set at rest, as we have already seen, by the answer. Therefore, the material inquiry for the jury was as to the alleged negligence. The testimony on this point is very voluminous, covering several hundred pages of manuscript, and no valuable purpose could be served by copying, or by giving a fair synopsis of it here. Suffice it to say that, although somewhat conflicting, especially on minor points, it was certainly sufficient to warrant the finding of the negligence charged, and we even fail to see how a different conclusion from that wrought out by the jury could in reason have been reached. There is no reason, therefore, for disturbing the verdict on this ground. As we find no substantial error in the matters complained of the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

FRANCIS LAUSMAN, APPELLANT, V. WENZEL DRAHOS, FREDERICK SONNENSCHNAIN AND MARY PARROTT, ADMINISTRATRIX OF WILLIAM PARROTT, DECEASED, APPELLEES.

Construction of Will. Devise under item 1 of will, copy of which is set out at length in the opinion, *Held*, to be absolute and unconditional. And *held* further that even were such devise con-

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ditional upon the payment by the devisee of other bequests, under the will, no one but the legatees not paid could take advantage of such non-payment.

APPEAL by plaintiff from Cuming county. Heard below, before BARNES, J., and petition dismissed. The case is stated in the opinion.

Uriah Bruner, for appellant.

1. The decision in 10 Neb., 172, is conclusive so far as the allegations against Sonnenschein are concerned.

2. As to averments against Drahos and Sonnenschein charging fraud, etc., see *Kuch v. Sandford*, 1 Leading Cases, 48. Story's Equity, 307 to 312. *Taglor v. Taylor*, 8 How., 200. The collusion of Drahos and Sonnenschein under the said scheme to defraud the plaintiff out of said premises, makes the act of either, in furtherance of said fraud, the act of the other. Aside from said fraud, and from said position of trust assumed by Drahos, the purchase by him with the knowledge he had of a common interest with Sonnenschein, the tenant, makes said Drahos a trustee with Sonnenschein for said plaintiff, in such purchase. A purchase is complete with the accepted bid, and a change of a name to the bid is identical of a sale and transfer from such purchase to the party to whom such bid is transferred. Under whatever view Drahos' position is viewed under this purchase, he will be held to have bought said premises as the trustee for said plaintiff. Mrs. Lausman's property having been sold under said decree of foreclosure, while there was a large amount of property included in said decree of greater value than the amount of said mortgage debt, which remained unincumbered and had not been in any way alienated by Mr. Neligh, until after sale and conveyance of said premises to Mrs. Wisner, under whom said plaintiff holds, and the amount realized therefor applied on said mortgage debt, it follows that said plaintiff will be

allowed to be subrogated to be paid out of the property remaining unsold for the amount for which her said premises was sold, with interest at ten per cent. from the day of such sale. But if the court should deny the plaintiff's right to redeem said premises from said sale, then she will be entitled to such substitution for the full value of said premises (\$1,200). *Gill v. Lyon*, 1 Johnson, Ch., 447. *Clows v. Dickinson*, 5 Johnson, Ch., 295; 9 Cowen, 403.

R. F. Stevenson and M. McLaughlin, for appellees.

Plaintiff's brief does not refer to matter submitted to court by our demurrer, but goes off into "strange pastures" and discusses issues not involved in the case. We claim that plaintiff's title depends upon her compliance with terms of will in the matter of bequests. They were conditions precedent. *Nervius v. Gourley*, 97 Ill., 365.

COBB, J.

This is the third time that this case has been before this court. See 8 Neb., 457, and 10 Id., 172. But in order to a proper understanding of the point now presented to the court, it should be stated, in addition to the facts recited in the two opinions above referred to, that the plaintiff claims the premises which are the subject matter of the suit, under and by virtue of the will of her deceased husband. The following is a copy of that part of the petition in which she sets out her title.

"5. That prior to his death said Anton Merick made his last will and testament, to-wit: on the 29th day of May, 1875, and thereby devised unto his said wife, the said plaintiff, the said lot 6, in block 19, in West Point, in lieu of her dower, which said will was duly probated and allowed in the manner provided by law, on the 18th day of July, 1875, and was recorded in the records of Cuming county, state of Nebraska, and the said allowance and

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approval was duly endorsed thereon by the judge of said probate court, a copy of said last will and testament and the endorsements thereon and the proceedings had by said court in the probate and allowance thereof is hereto attached, marked exhibit C, and made a part of this petition. That on the said 13th day of July, 1875, said plaintiff was duly appointed executrix under said last will and testament," etc.

"6. That afterwards, to-wit: on the 17th day of July, 1875, the said will and testament with the said endorsements was duly recorded in the county clerk's office of said county of Cuming," etc.

"7. That said plaintiff has elected to take under said will and testament in lieu of her dower, and did take under the same and thereby became the lawful owner in fee of said premises * * * in all respects, as fully as the said Anton Merick was, and is the owner and continues to be the owner thereof and entitled to the peaceable possession thereof. That said plaintiff has fulfilled all and singular the conditions of the said will on her part to be performed," * * * etc.

The petition further alleges in substance, that the defendant, Mary Parrott, administratrix etc., was the holder of a certain mortgage upon a large amount of property, including the said devised real estate, executed by one John D. Neligh, while he was the owner of all of said real estate; that said Neligh had afterwards alienated the said devised real estate to the grantor of the said Anton Merick, but had not alienated any other portion of the real estate covered by the said mortgage; that said mortgage had been foreclosed; that the said plaintiff had notified the defendant, Mary Parrott, of her rights in the premises and demanded that that part of said real estate not alienated by the said John D. Neligh, should be first sold; that such unalienated portion of said mortgaged property was sufficient to pay said mortgage, but that

said devised property had been offered for sale and sold on said decree of foreclosure without offering any of the other and unalienated portion of said mortgaged property.

The petition further charges in substance, against the said defendants Sonnenschein and Drahos, that Sonnenschein was her tenant in possession of the said real estate under her by lease, at the time of said sale, and while so in possession under her bought in the said property in the name of himself and Drahos at the mortgage sale thereof; that such sale and purchase were made while the plaintiff was absent from the state, and while she relied, and had a right to rely, upon the defendant Drahos as her confidential adviser and friend, for the protection of her rights in the said property, etc. That the said Drahos and Sonnenschein, after having agreed to allow her to redeem said property by paying them the amount by them paid therefor, had refused to allow her so to do, and she charges them with fraud and conspiracy to wrong her out of the said property.

All of the defendants join in a demurrer to the petition on the ground that the same does not state facts sufficient to constitute a cause of action against the defendants. The demurrer was sustained by the district court and final judgment rendered thereon. The plaintiff brings the cause to this court by appeal.

The appellees present but one point to sustain the said judgment and their position that the said petition does not state facts sufficient to constitute a cause of action, to-wit: that the devise of said lot to the plaintiff was a conditional one and that the petition does not state a sufficient compliance with such conditions.

The following is a copy of the substance of the will under which the plaintiff claims, as set out in said petition:

Item 1. I give and devise to my beloved wife, in lieu of dower, after paying all my just debts, and she pay-

ing the items to the other parties mentioned in items 2d, 3d, 4th, 5th and 6th, the house and lot on which we now reside, being lot six, in block nineteen, in the city of West Point. Also, all my personal property, rights, credits, moneys of whatever kind, to have and to hold the same forever.

Item 2. I devise and bequeath to my mother, Therese Merick and her heirs, the sum of fifty dollars, the same to be paid to her within one year after my death, without interest, by my wife.

Item 3. I give and bequeath to my brother, John Merick, the sum of forty dollars, to be paid to him by my wife, within five years after my death, without interest.

Item 4. I give and bequeath to my brother, Frank Merick, the sum of forty dollars, to be paid to him within five years after my decease, by my wife, without interest.

Item 5. I give and bequeath to my brother, Joseph Merick, the sum of forty dollars, to be paid to him by my wife, within five years after my decease, without interest.

Item 6. I give and bequeath to my sister, Therese, the sum of forty dollars, to be paid to her by my wife, within five years after my decease, without interest.

Item 7. I do hereby nominate and appoint my beloved wife executrix of this my last will and testament, hereby authorizing her to compromise, adjust, release and discharge, in such manner as she may deem proper, the debts and claims due me. I do hereby authorize her, if it becomes necessary in order to pay my debts, to sell by private sale or in such manner, upon such conditions or terms of credit, or otherwise, as she may think proper, all or any part of the real estate herein mentioned, and deeds to purchasers, to execute, acknowledge and deliver in fee simple. * * * Nothing herein contained shall be construed so as to abridge the right of my beloved wife to sell any and all the property belonging to me at

my death, as of her own, nor shall anything herein be so construed as to modify in the least the bequests mentioned in item first, etc.

As we understand this will, the bequest to appellant is not conditional upon the payment by her of all or either of the bequests made to the other beneficiaries under the will. Item seven provides, that nothing in said will contained shall be construed so as to abridge the right of appellant to sell any and all property belonging to the testator at his death, as of her own. This provision was clearly intended to enable the appellant to raise the means by the sale of the property left by the testator, by which to pay off the bequests made to his mother, brothers and sister, as well as to pay his debts. How could she do this, unless she took a marketable title thereto under the will? Again, that there should be no room to doubt the intention of the testator the said item further provides, "nor shall any thing herein—(in said will)—be so construed as to modify in the least the bequests mentioned in item first." Item first is the one in which the property in question is bequeathed to the appellant, and it is scarcely possible that any construction can either add to, or take from the plain and obvious meaning of the testator in the use of the language employed that the appellant should have the property in question at all events.

But even were we mistaken in our construction of the will, and it should be so construed as to make the right of the appellant to the property in question conditional upon her payment of the other bequests, no one but the legatees, certainly no stranger to the will and estate of the testator, can take advantage of the non-payment thereof. What difference can it make to either of the appellees whether the legatees are ever paid or not; and how can their non-payment operate to discharge the appellees from any of the equitable duties which for any reason they may owe to the appellant?

Upon sufficient proof by the appellant of the facts set out in her petition, she will, as far as the court is now able to see, be entitled to the relief demanded as against each of the appellees; certainly to some adequate relief.

The judgment of the district court is therefore reversed, the action reinstated and remanded to the district court for further proceedings in accordance with law.

REVERSED AND REMANDED.

12	109
13	426

MARY A. SHROAF, PLAINTIFF IN ERROR, v. JOHN M. ALLEN,
DEFENDANT IN ERROR.

1. **Replevin: EVIDENCE.** In an action of replevin for a hog, the proof showed that the hog was taken *damage feasant* by the defendant in her corn field, and shut up; that plaintiff's son saw defendant's son taking said hog to the pen, and went immediately home and informed the plaintiff; that the plaintiff went the next day and demanded said hog but denied that it had committed any damage; that about a month afterwards the parties agreed to arbitrate, but for some reason did not. The action was commenced about sixteen months after the taking up of the hog. The defendant was sworn as a witness in her own behalf, and among other things testified as follows: "We agreed to settle by arbitration. I picked my arbitrator and he picked his arbitrator, then we set a day to settle it and my arbitrator come." The plaintiff objected to the testimony and his objection was sustained by the court. *Held*, error.
2. —: **INSTRUCTIONS TO JURY.** The court instructed the jury that: "Although the sow in controversy could be held for any damage done while trespassing upon the cultivated land of the defendant, yet, in order to enforce this lien against the sow it was necessary for defendant, after taking up the trespassing animal, to do certain things which the law requires, or else the lien would be lost. 1st, if the defendant knew whose sow it was she had taken up, and that it was plaintiff's, she should have notified him of the fact and of the amount of damages she claimed. And in the event that he had refused to pay the damage claimed and refused to arbitrate the claim, then she should have filed her

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claim before a justice of the peace and had the hog sold to pay the amount. All of this should have been done within a reasonable time, and if you find from the evidence that the defendant kept the sow in controversy for upwards of sixteen months, without having in any manner complied with the law in regard to having the property sold to satisfy the damage, you will find for the plaintiff," etc. In view of the testimony given and the rejection by the court of the testimony of the defendant as to the failure on the part of the plaintiff to arbitrate, *held*, that the giving of the instruction was error.

ERROR to the district court for Johnson county. Tried below, before WEAVER, J., and a jury. The action was in replevin by Allen against Shroaf, to recover possession of a sow. The answer interposed was a general denial, under which Shroaf as a defense claimed to have a lien on the animal under the herd law. Verdict and judgment for Allen.

B. F. Perkins, for plaintiff in error.

Davidson & Easterday, and *V. D. Metcalfe*, for defendant in error.

COBB, J.

The plaintiff in error was lawfully in possession of the hog, it having been taken *damage feasant*, trespassing on the cultivated lands of the plaintiff. The defendant in error knew of such taking up as soon as the plaintiff did; his son having seen the family of the plaintiff in error leading the hog to the pen. The defendant called on the plaintiff in error and had an interview the next day. She claimed to hold the hog for the damages done by it and the other hogs of defendant in error, which damages she claimed amounted to more than the value of the hog, while he denied that either the hog in question or his other hogs had committed any damage to plaintiff's corn field; but claimed that all such damage had been committed by the hogs of another person.

It was clearly established on the trial that the hog

committed some damage to the corn of plaintiff in error, for which the statute gave her a lien upon, and a right to the possession of the hog, for the purpose of enforcing such lien. There were several different methods open to her for the enforcement of her lien. The one most favored by the law was arbitration.

Upon the trial the plaintiff in error was sworn as a witness in her own behalf, and among other things testified that she and defendant in error agreed to settle the matter by arbitration; that she picked her arbitrator and he picked his arbitrator; that they set a day to settle it, and that her arbitrator came. Witness proceeding with her statement, the defendant in error objected thereto, and his objection was sustained by the court. In this the court erred.

The court afterwards gave the following instruction to the jury: "Although the sow in controversy could be held for any damage done while trespassing upon the cultivated land of the defendant; yet, in order to enforce this lien against the sow it was necessary for the defendant, after taking up the trespassing animal, to do certain things which the law requires, or else the lien would be lost. 1st, If the defendant knew whose sow she had taken up, and that it was plaintiff's, she should have notified him of the fact and of the amount of damages she claimed, and in the event that he had refused to pay the damage claimed and refused to arbitrate, then she should have filed her claim before a justice of the peace and had the hog sold to pay the amount. All this should have been within a reasonable time, and if you find from the evidence that the defendant kept the sow in controversy for upwards of sixteen months without having in any manner complied with the law in regard to having the property sold to satisfy the damages, you will find for the plaintiff," etc.

This instruction is erroneous in not being applicable

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in at least two material respects to the facts of the case, and in being inconsistent with the ruling of the court, excluding the testimony of the plaintiff in error in reference to the agreement between herself and defendant in error to arbitrate, and the facts in relation to such agreement not being carried out.

The testimony is clear and comes from both sides that the plaintiff below had actual notice of the taking up of the hog the same day, and called upon the defendant below the day following, and demanded possession of it the day following. It is also clear and uncontradicted that a month later he agreed to arbitrate. The court refused to allow the defendant below to show why and whose fault it was, that this agreement was not carried out, and then makes the failure of the plaintiff in error to notify the defendant in error of the taking up of the hog within a reasonable time, a prominent point in his instructions to the jury. Clearly, under the circumstances as proved, it was not necessary for her to give him notice at all. If it was, such notice was waived by his agreement to arbitrate. And again, that which would have been an unreasonable time for the plaintiff in error to have retained possession of the hog, without giving notice to a known owner, who had no actual notice of the taking up, might be quite a reasonable time where the owner had actual and immediate notice, had agreed to arbitrate, and for some unknown reason had postponed or abandoned such agreement.

That the plaintiff in error retained possession of this property for an unusual length of time cannot be denied, but upon the testimony given, and in view of that offered, and as we think erroneously ruled out, it was not so unreasonable as to enable the defendant in error to maintain replevin without a tender of payment for the damages for the trespass of the animal and some compensation for its keeping.

Clutz v. Carter.

The judgment of the district court is therefore reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

CHARLES CLUTZ, PLAINTIFF IN ERROR, v. JONATHAN R. CARTER, DEFENDANT IN ERROR.

12	113
21	598
19	113
32	510
12	113
41	858

Practice: DEFAULT: JUDGMENT. At the June term of the district court the petition of plaintiff was stricken from the files with leave to verify and refile the same within a given time. After that time had elapsed and the petition not being filed, B., the attorney of defendant, informed him of such fact, and that he need give the case no further attention until advised by him, said attorney. At the December term following, L., another attorney, made a voluntary and unauthorized appearance on behalf of said defendant, and moved to dismiss said cause for want of a petition on file. The court denied said motion and allowed plaintiff to refile his petition *instantly*, and gave the defendant sixty days in which to answer. B. knew of the appearance and motion of L., and supposing that defendant had substituted L. as his attorney, gave the case no further attention, and defendant had no notice of such proceedings. At the March term following the plaintiff having complied with the order of December, the cause was tried in the absence of defendant or an answer, and judgment for the plaintiff. At the same term defendant moved for a new trial, to be let in to defend and showed cause; motion denied. *Held* error, and new trial awarded with leave to defendant to answer.

ERROR to the district court for Adams county. Tried below, before GASLIN, J.

Bowen & Tanner, for plaintiff in error.

Ash & Scofield, for defendant in error.

COBB, J.

This action was commenced in the district court of

Adams county, June 8d, 1878, by Jonathan R. Carter, against B. F. Hyde, and the plaintiff in error, Charles Clutz as securities of Ellen Potter, on a replevin bond. Plaintiff in error was personally served with process. B. F. Hyde was not served. The plaintiff filed his petition without verification.

On the 20th of June 1878, defendant Clutz appeared by A. H. Bowen, his attorney, and filed his motion to strike said petition from the files for the want of verification.

June 25th, the court made an order granting leave to the plaintiff to verify and refile his said petition within five days, and granting leave to the defendant Charles Clutz, to plead, answer or demur, within twenty days.

July 1st, 1878, the following order was entered: "This day leave granted said plaintiff to verify and refile his petition within ten days, and leave granted said defendants to answer within thirty days thereafter."

On the 8d day of December, 1878, a motion was filed in the following words: "Comes now the said defendants and move the court here to dismiss this said action and shows the court the following grounds therefor. That said plaintiff has no petition on file as required by a previous order of this court.

JAMES LAIRD,
B. F. SMITH, and
A. H. BOWEN,
Attorneys for defendants."

On the 8d day of December, the said motion was submitted to the court. On the following day the said motion was overruled and leave granted to the plaintiff to file his petition *instantly* and to the defendant to answer within sixty days. And on the same day the petition was filed duly verified.

On the 31st of March, 1879, the following judgment was entered in the cause: "And now on this day this

cause coming on to be heard without the intervention of a jury, upon the pleadings and evidence the court doth find the issues joined in favor of the plaintiff and against the defendant Charles Clutz, and that the defendant Charles Clutz is indebted to the plaintiff in the sum of \$340.00. It is therefore considered and adjudged by the court here, that the said plaintiff do have and recover of and from the said defendant Charles Clutz the said sum of \$340.00 and costs of suit," etc.

On the 7th day of April, 1879, the said defendant, Charles Clutz, by A. H. Bowen, his attorney, filed his motion to set aside the default theretofore entered against him in said action and to permit him to answer therein, and that said defendant have opportunity to defend said action, etc. To sustain which motion, he also filed his own affidavit, stating *inter alia* that, upon being served with process in said action, he engaged A. H. Bowen, to appear for him and defend said action in his behalf; that said Bowen did so appear at the June term 1878, and upon the motion of the said Bowen the petition in said action was stricken from the files with permission to refile within 30 days; that the affiant was informed by said Bowen, his attorney, after the expiration of the said 30 days that said petition had not been refiled and that he said affiant need not appear again unless notified by him, said Bowen; that he received no notice from said Bowen or any other person of the pendency of said action, and that he did not know of said action until on the 5th of April, inst., when he learned of the rendition of judgment against him; that he never employed or authorized any attorney to appear for him in said action other than said Bowen, and that the appearance of other attorneys on his behalf was voluntary on their part, and wholly unauthorized by him, and that he had a good and complete defense to said action.

And also the affidavit of A. H. Bowen, that he was

Clutz v. Carter.

engaged by said defendant Clutz to appear for and defend him in the said action, that he did so appear at the June term of said court, 1878, and upon affiant's motion the petition of plaintiff was stricken from the files and permission given to refile within a certain time; that the said petition was not filed within the time so given, nor until the December term of this court, 1878; whereupon other attorneys appeared for defendant Clutz, and affiant supposing that his services were no longer required took no further steps in the case for said defendant Clutz. Affiant further states that he notified said Clutz after the expiration of the time given in which plaintiff might refile his petition, that said petition had not been refiled; that he need not appear until notified; that the reason he did not so notify Clutz was that other counsel appeared for him in said case at said December term, 1878, and that affiant believes that the said defendant has a good and complete defense to said action.

And also the affidavit of James Laird, Esq., in which the affiant states "that he is one of the attorneys of the firm of Laird & Smith, who appeared for defendant Clutz, at the December, 1878, term of the court; that such appearance was entirely voluntary on his part for said firm, having prior to said time done the legal business of the said defendant Clutz, and that said appearance was not made by any authority of said Clutz, either directly or indirectly to affiant's knowledge."

Defendant's motion was overruled by the court.

From an examination of the case as above set out it seems quite clear that the plaintiff in error, for no apparent fault of his own, has been deprived of an opportunity to make his defense in said cause. It is the spirit and policy of the law to give every party an opportunity to prosecute or defend his case in court, and courts will never deny such right except for the fault or gross laches of such party or his authorized attorney.

The application to set aside the default and judgment and let the defendant Clutz in to defend was timely made, and the showing sufficient, and should have been allowed.

The judgment of the district court is therefore reversed, the default of plaintiff in error set aside, and the cause remanded with directions to allow the defendant Clutz a reasonable time in which to answer and for further proceedings according to law.

REVERSED AND REMANDED.

L. M. GREEN, AND C. C. BROWN, ASSIGNEE, APPELLANTS, V.
WILLIAM L. GROSS, APPELLEE.

1. **Assignment for Creditors: ATTACHMENT.** B., a resident of Illinois, made an assignment of all his property, including lands in this state, for the benefit of creditors. *Held*, that a resident of that state claiming the benefit of the assignment could not maintain an attachment levied after the assignment of the lands in this state.
2. **Deed: EXECUTION IN ANOTHER STATE.** A deed of lands in this state, made in another state, must be executed according to the laws of such state, and if no witness to the deed is required by the laws of such state the deed is effectual to pass title without being so attested.
3. —: **CERTIFICATE OF ACKNOWLEDGMENT.** When a deed is made in another state the certificate of acknowledgment of a notary public thereto, duly attested by his official seal, entitles such deed to be recorded without further authentication.

APPEAL from Nemaha county. Tried below before POUND, J. The opinion states the case.

J. L. Mitchell and S. A. Osborn, for appellants.

1. The attachment can only operate upon the rights of Bunn existing when it was made. The purpose of an attachment is simply to secure to the creditor the property

12	117
14	178
18	117
34	644
13	117
49	264
49	449
49	454
49	464
50	657

Green v. Gross.

which the debtor had at the time it was made so that it may be sold to satisfy the debt after judgment is obtained. If Bunn had no right to or interest in the land at the time, then Gross acquired none by his attachment. Whatever right Brown had as assignee was unchanged and unaffected by the attachment. Drake on Attachment, Secs. 219, 220, 227, 228. *Bigelow v. Wilson*, 1 Pick., 485. *Blake v. Shaw*, 7 Mass., 505. *Starr v. Moore*, 8 McLean, 354. *Tiernan v. Murrah*, 1 Robinson La., 443. *Stowell v. Jewett*, 9 Ohio, 181, and cases cited.

2. No witness to deed is required by the law of Illinois, and the deed in controversy having been made in that state, is good and valid here. Gen. Stat., Chap. 61. *Hoadley v. Stevens*, 4 Neb., 431.

Edwin F. Warren, for appellee.

1. The petition alleges that before the levying of the attachment the real estate was the property of Brown, that in August, 1879, and before the commencement of this action Brown "sold and conveyed the said lands to the plaintiff L. M. Green, and executed and delivered to him a good and sufficient warranty deed therefor." That being so, Brown at the commencement of this action had no interest whatever in said lands, nor any interest in said suit, unless the giving of a "good and sufficient warranty deed" would give him a cause of action to restrain a sale that *might* cause a breach of his covenants, but when said deed was introduced in evidence it turned out to be a *quit claim, with no covenants*. Its introduction proved Brown out of court. As to Green, he had a complete and adequate remedy at law. His alleged title through Brown was of record; Gross levied his attachment subject to it, whatever it was, and his proceedings would not create even a cloud upon the title of Green, unless Bunn had an interest in said lands at the date of the levy, and the petition expressly declares that

Green v. Gross.

Bunn then had no interest. Gross was entitled to a jury trial upon the question of his right of possession under the forthcoming sheriff's deed.

2. Title to realty can be acquired and passed only according to *lex rei site*. Story Conflict of Laws, Sec. 424, note 8. *Lies v. DeDiablar*, 12 Cal., 327. *Lucas v. Tucker*, 17 Ind., 41. *Insurance Company v. Bank*, 68 Ill., 348. *Sutton v. Stone*, 4 Neb., 319. *Irwin v. Welch*, 10 Neb., 479. *Roode v. The State*, 5 Neb., 174.

3. The assignment being void, the deed from Bunn to Brown, being ancillary thereto and wholly without consideration, was also void. *Osborn v. Adams*, 18 Pick., 245. *Gardner v Bank*, 95 Ill., 298.

MAXWELL, CH., J.

This is an action to quiet title. Judgment was rendered in the court below in favor of the defendant and the action dismissed. The plaintiffs appeal to this court.

It appears from the record that about the 1st of January, 1878, one Jacob Bunn, a resident of Springfield, Illinois, being largely indebted, made a voluntary assignment of all his property to C. C. Brown for the benefit of all his creditors; that the assignment was made under the statute of Illinois, and was filed for record in the office of the recorder of deeds, of Sangamon county, in that state, on the 2d of January; 1878, and a certified copy thereof, together with a schedule of the real and personal estate of said Bunn, including the lands in controversy, was filed in the office of the county clerk of said county, on the 7th day of that month. On the 5th of January, 1878, Bunn and wife executed and delivered to Brown a deed of conveyance of "all the real estate owned by the parties of the first part, situated in the county of Nemaha, in the state of Nebraska." This deed was objected to on the trial "as incompetent and immaterial; that it is not witnessed as required by the

laws of Nebraska; that it has no certificate of any officer that it is executed in accordance with the laws of any other state; that it is indefinite, describing no property; and that under the pleadings in the case it is admitted to be a voluntary conveyance." The objections were overruled and the deed read in evidence.

The certificate of acknowledgment is as follows :

STATE OF ILLINOIS, }
COUNTY OF SANGAMON. } ss.

* NOTARIAL
SEAL. *

I, Samuel Bennett, a notary public in said county, do hereby certify that Jacob Bunn and Elizabeth J. Bunn, his wife, who are personally known to me to be the same persons whose names are subscribed in the foregoing instrument appeared before me this day in person, and each severally acknowledged that they signed and delivered said instrument as their free and voluntary act, for the uses and purposes herein set forth, including the release of the right of homestead and dower.

Given under my hand and notarial seal this first day of January, A. D. 1878.

SAMUEL BENNETT, *Notary Public.*

There is no witness to the deed. It was recorded in Nemaha county, on the 9th day of January, 1878.

On the first day of February, 1878, the defendant, a resident of Springfield, Illinois, commenced an action against Jacob Bunn in the district court of Nemaha county and attached all of sections 34 and 35, in township 6, north, range 12, east, in said action, as the property of Jacob Bunn, and since that time has recovered judgment against Bunn in said action and the court has made an order for the sale of said attached property.

On the 11th day of April, 1878, the defendant filed his claim against Bunn for \$1,726.58 in the county court of Sangamon county, asking for pro rata distribution in the

estate of said Bunn, but stating in his affidavit attached to said claim that he had attached the property in controversy and claiming whatever benefits might be derived therefrom.

On the 30th day of August, 1879, Brown sold and conveyed the lands heretofore described in Nemaha county to L. M. Green, for the sum of \$1,800.00. Green is in possession and brings this action to quiet the title and enjoin a sale under the order of sale under the attachment. No question is made as to the validity of the assignment and the only question necessary to be considered is whether or not Bunn, after the execution of the assignment and deed for the lands in controversy, and recording said deed in Nemaha county, had any attachable interest in the lands heretofore described.

Without determining whether an assignment made in Illinois is binding upon and can affect creditors residing in this state, so as to prevent the property assigned from being taken on attachment, as that question is not before the court, there can be no question as to its binding effect upon citizens of Illinois. That is, an assignment for the benefit of creditors made in conformity to the laws of the state, which is not attacked for fraud or other cause, is so far conclusive upon creditors residing in that state that the property assigned is not afterwards subject to attachment. In the case at bar the assignment was duly made and the assignee at once accepted the trust and commenced to discharge his duties as assignee. The defendant, a resident of the same town and state with the debtor, and with full notice of the assignment, a month afterwards commences the action by attachment in this state, and afterwards files his claim against the estate of Bunn, thus recognizing and claiming all the benefits to be derived from the assignment. Even if the assignment was voidable he would seem to be precluded upon equitable grounds from asserting the lien of his attachment

thus obtained after the assignment, to the exclusion of other creditors.

The principal ground upon which it is claimed that the title to the property in controversy did not pass to the assignee is that no copy of the assignment was filed in Nemaha county, and that the deed of conveyance from Bunn and wife to the assignee was not witnessed or properly certified.

Sec. 1 Chap. 73, Comp. Stat., provides that: "Deeds of real estate or of any interest therein in this state, except leases for one year or less time, must be signed by the grantor, being of lawful age, in the presence of at least one competent witness, who shall subscribe his name as a witness thereto and be acknowledged, proved and recorded as directed in this chapter."

Sec. 2 provides that: "The grantor must acknowledge the instrument to be his voluntary act and deed."

Sec. 3 provides that: "The acknowledgment must be made or proved, if in this state, before a judge or clerk of any court, or some justice of the peace, or notary public therein; but no officer can take such acknowledgment or proof out of his territorial jurisdiction."

Sec. 4 provides that: "If acknowledged or proved in any other state or territory, or district of the United States, it must be done according to the laws of such state, territory or district, or before a commissioner appointed by the governor of this state for that purpose."

Sec. 5 provides that: "In all cases provided for in section four of this chapter, (if such acknowledgment or proof is taken before a commissioner appointed by the governor of this state for that purpose, notary public or other officer using an official seal) the instrument thus acknowledged or proved, shall be entitled to be recorded without further authentication; *Provided*, that in all other cases, the deed or other instrument shall have attached thereto a certificate of the clerk of a court of

record, or other proper certifying officer of the county, district or state, within which the acknowledgment or proof was taken, under the seal of his office, showing the person whose name is subscribed to the certificate of acknowledgment was at the date thereof such officer as he is therein represented to be; that he is well acquainted with the handwriting of such officer; that he believes the signature of such officer to be genuine, and that the deed or other instrument is executed and acknowledged according to the laws of such state, district or territory."

A deed executed in this state must be signed by the grantor in the presence of at least one competent witness, who shall subscribe his name thereto as a witness, and the grantor must acknowledge the instrument to be his voluntary act and deed before some officer designated by the statute.

At common law, and in the absence of a statute to the contrary, a deed for lands in this state executed without the state must be executed in the same manner as a deed made in this state. But our statute has changed the rule of the common law and requires a deed executed in "any other state, territory, or district of the United States to be acknowledged or proved according to the laws of such state, territory or district, before any officer authorized by the laws of such state, territory or district to take such acknowledgment." *Hoadley v. Stevens*, 4 Neb., 491.

If no witness is required to a deed in that state, none will be required to a deed executed there for the conveyance of lands in this state. The reason is, the statute prescribes the mode of conveyance, and that a deed valid where made shall be effectual to pass the title to land in this state. In the absence of statutory provisions to the contrary a deed duly signed and delivered, but not acknowledged, would as against the grantor and those claiming under him convey whatever interest of the

grantor it purported to convey. *Simpson v. Mundee*, 3 Kas., 172. *Harrison v. McWhirter*, decided at this term. In the case at bar it is clearly shown by the testimony that no witness is required in Illinois to attest the signature of the grantor. The deed is not objectionable therefore on that ground.

The fifth section of the act provides that if the officer taking the acknowledgment uses an official seal, the instrument thus acknowledged or proved, shall be entitled to be recorded without further authentication. Courts take judicial notice of the seal of a notary public, and it proves itself *prima facie* by its appearance upon the certificate. *Nichols v. Webb*, 8 Wheat., 326. *Townsley v. Sumrall*, 2 Pet., 170. *Dickens v. Beal*, 10 Pet., 582. *Mullen v. Morris*, 2 Barr., 86. *Nelson v. Fotherall*, 7 Leigh., 180. *Carter v. Burley*, 9 N. H., 558. *Bryden v. Taylor*, 2 Har. & J., 399. The acknowledgment in this case was taken before a notary public, and by the express terms of the statute no further authentication was necessary to entitle the deed to be recorded, the presumption of the law being that it was executed according to the laws of the state where it was made. The deed was therefore properly signed and acknowledged, and conveyed all the title of the grantor to the premises in question. And the plaintiff Green being in possession of the premises is entitled to maintain the action and to relief. The price paid by him for the lands in controversy seems greatly inadequate. But the character of the title or amount of incumbrance thereon does not appear in the record. And if the price is wholly inadequate the remedy is to have the sale set aside or, in case of collusion, proceed against the assignee. The judgment of the district court is reversed and the cause remanded to the district court with directions to render judgment in conformity to this opinion.

REVERSED AND REMANDED.

H. J. SMITH, APPELLANT, v. JURGEN JANSEN AND MARGARET JANSEN, APPELLEES.

Promissory Notes: BONA FIDE PURCHASE. S., a resident of New York, purchased before maturity five negotiable promissory notes, each for the sum of \$20.00, secured by mortgage on real estate, for \$30.00. *Held*, That a judgment that he was not a bona fide purchaser, would not be reversed.

APPEAL from Johnson county. Tried below before WEAVER, J. The facts appear in the opinion.

Pinero & Selby and *B. F. Perkins*, for appellant.

1. The district court erred in dismissing the case. *Wortendyke v. Meehan*, 9 Neb., 221. *Savings Bank v. Scott*, 10 Neb., 83.

2. Possession of a negotiable instrument is *prima facie* evidence that the holder is the proper owner and lawful possessor of the same, and the burden of proof is on the opposite party to show the contrary. *Collins v. Gilbert*, 4 Otto, 753. *Brown v. Spofford*, 5 Otto, 474.

Davidson & Easterday and *T. Appleget & Son*, for appellees, cited 3 Kent's Com., 80. Edwards on Promissory Notes, 372. *Smith v. Strong*, 2 Hill, 246. Chitty on Bills, 278. *Kendall v. Robertson*, 12 Cush., 159. *Bacon v. Lee & Gray*, 4 Clarke, 490. A promissory note, though secured by mortgage, is still commercial paper assignable at law, and when the remedy is sought upon that, all the rights incident to commercial paper will be enforced in the courts of law; but when resort is had to a court of equity to foreclose the mortgage, the court will let in any defense which would have been good against the mortgage in the hands of the mortgagee himself, and this regardless of the fact that the assignee may have purchased the notes in good faith before maturity. *Olds v.*

Smith v. Jansen.

Cummings, 31 Ill., 188, 192. *Johnson v. Carpenter*, 7 Minn., 176, 182, 183. *Nichols v. Lee*, 10 Mich., 526, 528.

MAXWELL, CH., J.

In January, 1876, the defendants applied to one B. F. Perkins, agent of P. D. Cheney and others, for a loan of \$200.00. A loan for the above amount was obtained on five years time, the interest thereon to be 20 per cent. per annum, the defendants paying Perkins \$150 out of the \$200.00 for his services in effecting the loan. Eleven notes, one for \$200.00, and ten for \$20.00 each appear to have been taken, but the note for \$200.00 and five of the interest notes appear to have been paid, at least are not directly involved in this case. Five of the interest notes amounting to \$100.00, were secured by a separate mortgage, and on the 3rd of January, 1877, were transferred to the plaintiff. He claims to have purchased the same for \$30.00, and to be a bona fide purchaser. The court below found that he was not a bona fide purchaser and dismissed the action. He appeals to this court.

The only question presented by the record is whether or not he is a bona fide purchaser. The rights of a holder of negotiable paper purchased before due are to be determined by the simple test of honesty and good faith on his part in making the purchase. In determining whether the purchaser has acted in good faith or not the amount of the consideration may become a material inquiry.

In *Dewitt v. Perkins*, 22 Wis., 474, it was held that purchasing a note of \$300.00 for \$5.00 against a solvent maker was very strong if not conclusive evidence of bad faith. And a like decision was rendered in *Hunt v. Sanford*, 6 Yerg., 387, where a note for \$333.33 was purchased for \$125.00, and in *Gould v. Stevens*, 48 Vt., 125, where a note for \$300.00 was purchased for \$50.00. In some of the cases it is said that the consideration must

be full and fair as well as valuable. *Goldsmid v. Lewis Co. Bank*, 12 Barb., 410. *Hall v. Wilson*, 16 Id., 548.

In the case at bar, notes for \$100.00 secured by mortgage upon real estate, and presumably worth their face less the interest, were purchased for \$30.00, one of the notes being then due in a few days. Was this not sufficient to put the plaintiff upon inquiry as to the inception of the notes? Suppose the notes had been stolen and transferred to the plaintiff, would not the fact that he had purchased them for less than one-third of their face value have been sufficient to put him upon inquiry as to the title he acquired? Courts have gone quite far enough when they protect purchasers in good faith.

In *Miller v. Race*, 1 Burr, 452, the action being for a bank bill that was stolen, Lord Mansfield said: "Here an innkeeper took it bona fide in his business, from a person who made the appearance of a gentleman. Here is no pretense or suspicion of collusion with the robber, for this matter was strictly inquired into at the trial, and it is so stated in the case." "Indeed, if there had been any collusion, or any circumstance of unfair dealing, the case had been otherwise. If it had been a note for £1,000 it might have been suspicious; but this was a small note for £21 10s. only, and money given in exchange for it." The same principles were afterward applied by the same judge to negotiable paper, and *Miller v. Race* may be regarded as the leading authority upon this branch of the law.

Again the holder must have taken the paper in the usual course of trade in order to be protected, which does not appear to have been the case with the plaintiff.

We have carefully read the entire testimony, and in our opinion it clearly sustains the finding of the court below. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

12	128
22	666
18	128
26	80
18	128
29	676

REBECCA RHEA, PLAINTIFF IN ERROR, v. CHARLES W. REYNOLDS AND EMMA E. REYNOLDS, DEFENDANT IN ERROR.

1. **Pleadings:** JUDGMENT. Rhea commenced an action against R. and wife to recover a judgment against R., upon a promissory note and to enforce a vendors lien upon lands conveyed to the wife of R. The answer admitted the execution and delivery of the note, but denied the existence of the lien. The court found no lien existed and dismissed the action. *Held*, that Rhea was entitled upon the pleadings to judgment against R. for the amount of the note.
2. ———: ———. Where all the relief prayed for cannot be granted, it is the duty of the court to grant such relief as the established facts will warrant, whether it be legal or equitable.
3. **Conveyance:** LIEN FOR UNPAID PURCHASE MONEY. A grantor who conveys land by an absolute deed has no lien for such portion of the purchase money as remains unpaid. But such liens may be created by contract, and will exist where the grantor has only made a bond for a deed, or a contract to convey.

ERROR to the district court for Butler county. Tried below before Post, J. The opinion states the case.

Walter J. Lamb and *Samuel J. Tuttle*, for plaintiff in error.

1. Having received a deed to the land from the plaintiff in error, the defendants are estopped to assert that she had no title to convey in order to defeat a recovery on said note given for the purchase price of said lands. *Findley v. Horner*, 9 Neb., 537. *Walker v. Sedgwick*, 8 Cal., 398. Bigelow on Estoppel, 1st. ed. 414, 415.

2. The court should have given plaintiff judgment on the note. *McNeady v. Hyde*, 47 Cal., 481. *Davis v. Lambertsen*, 56 Barb., 480. *Hudson v. Caryl*, 44 N. Y., 553. *Parker v. Laney*, 58 N. Y., 469. *Stephens v. Magor*, 25 Wis., 533. Wells Res Adjudicata, sec. 455. *Blackinton v. Blackinton*, 113 Mass., 231. And in addition thereto a decree that such judgment constituted a lien on the

lands in question for the unpaid purchase money therefor. It is a rule of almost universal application in this country and England, that the vendor of real estate has an equitable lien upon the estate sold for the unpaid purchase money as between him and the vendee, or those deriving title through such vendee with notice, in all cases, unless there is an express or an implied agreement to waive such lien. *Dorsey v. Hall*, 7 Neb., 460. *Fish v. Howland*, 1 Paige Ch., 26. *Baum v. Grigsby*, 21 Cal., 176. *Wilson v. Lyon*, 51 Ill., 168. *McDole v. Purdy*, 23 Iowa, 278. 2 Story's Equity, sec. 1,226, and authorities cited. *Smith v. Rowland*, 13 Kan., 245.

M. H. Sessions, for defendants in error.

1. There is no proof in the case showing the insolvency of Charles W. Reynolds, the maker of the note. For all that appears, the presumption is that the plaintiff could at any time have collected the note from the maker. Under the facts as they exist in this case, the plaintiff should be compelled to exhaust her remedy upon her note before she could resort to the equitable relief here invoked. At least, she should be required to prove the insolvency of the maker in this action, as a condition precedent to granting the relief asked for. *Scott v. Crawford*, 12 Ind., 411. *Eyler v. Crabbs*, 2 Md., 137. *Pratt v. Van Wyck*, 6 Gill & Johnson, 495. *Richardson v. Stellingger*, 12 Gill & Johnson, 477. *Garson v. Greene*, 1 John Ch., 308. *Bottuf v. Conner*, 1 Blackf., 288. *Roper v. McCook*, 7 Ala., 318.

2. There is no such thing as a vendor's lien in this state upon an absolute conveyance of real estate by deed, for such portion of the purchase money as may remain unpaid. *Edminister v. Higgins*, 6 Neb., 265. *Kauffitt v. Bower*, 7 Sergt & Rawle, 64. *Heister v. Greene*, 48 Penn. State, 96. *Philbrook v. Delano*, 29 Maine, 410. If the doctrine was in force, still the plaintiff would not be en-

Rhea v. Reynolds.

titled to the lien, having waived it. *Richards v. Leaming*, 27 Ill., 432. *Gilman v. Brown*, 1 Mason, 216. *Hare v. Van Deusen*, 32 Barb., 98. *Selby v. Stanley*, 4 Minn., 75. *Parker v. Sewell*, 24 Texas, 241. *Cowl v. Varnum*, 37 Ill., 181. *Williams v. Reas*, 26 Wis., 540. *Griffin v. Blanchar*, 17 Cal., 71. *Williams v. Roberts*, 5 Ohio, 35. *Boynton v. Champlin*, 42 Ill., 57.

MAXWELL, CH. J.

In the year 1879 Charles W. Reynolds made and delivered to the plaintiff a promissory note, of which the following is a copy:

"LINCOLN, NEBRASKA, October 14, 1879.

January 1st after date for value received, I promise to pay to the order of Rebecca A. Rhea, four hundred dollars, at State National Bank, with interest at ten per cent. per annum from maturity until paid, together with a sum equal to ten per cent. of said amount as attorneys fee if action is brought on this note, or on the mortgage given to secure the same, or if the same is not paid when due.

CHARLES W. REYNOLDS."

It appears from the record that, prior to the time the note was given, the plaintiff had commenced an action of ejectment against the defendants to recover the possession of certain real estate in Butler county, and that the note in question and \$75.00 in cash were given to compromise that suit, the plaintiff executing a quit claim deed for the premises in controversy to Emma E. Reynolds, the wife of the maker of the note. The prayer of the petition is for a personal judgment for \$400.00, interest, and attorneys fees against Reynolds, and to enforce a vendors lien upon the premises conveyed. Judgment was rendered in the district court in favor of the defendants and dismissing the action. The plaintiff brings the cause into this court by petition in error.

The judgment of the court below is as follows: "In consideration whereof the court on this 10th day of February, 1881, being the 3rd day of the January term, 1881, does find upon the issues joined in favor of the defendants. The court further finds that the plaintiff is not entitled to a vendors lien as prayed. Plaintiff now moves for a personal judgment against Chas. W. Reynolds upon the pleadings, which motion the court overrules. Whereupon it is considered and adjudged that the defendants go hence without day, and that the plaintiff take nothing by her writ."

The petition sets forth the making and delivery of the note by Chas. W. Reynolds, that the plaintiff is the owner thereof, that it is now due and payable, and that no part of the same has been paid. The answer of the defendants states: "That on or about the 14th day of October, 1879, and while said suit was pending for trial in said court, the defendant, Chas. W. Reynolds, met the plaintiff in the city of Lincoln, and said suit was then and there compromised, and settled upon the following terms and condition, to-wit: The plaintiff agreeing that if the said Chas. W. Reynolds would pay her seventy-five dollars in money, and give his note for \$400.00, payable on the 1st day of January, 1880, then in consideration of the same she would give a quit claim deed to the defendant, Emma E. Reynolds, of all her pretended claim, right, title or interest in and to said land and real estate, and that she would not ask or claim any other or further security for the payment of said four hundred dollars than the individual note of the said Chas. W. Reynolds. And thereupon the said parties did settle said suit, and the said Chas. W. Reynolds did pay to the said plaintiff the sum of \$75.00, and the said Charles W. Reynolds did then and there execute and deliver to this plaintiff his promissory note for four hundred dollars, being the same note referred to in plain-

Rhea v. Reynolds.

tiff's petition. In consideration whereof the said plaintiff did then and there execute a quit claim deed to the said premises to said defendant, Emma E. Reynolds, and deliver the same, being the same referred to by plaintiff in her petition as the one she made and executed, and did then and there in consideration of the foregoing agree to waive, and did waive all liens upon said lands and real estate so conveyed, of every nature and kind whatsoever for the security of said note," etc.

Upon an answer like this, which admits the execution and delivery of the note, and every fact which would entitle the plaintiff to recover a judgment against Reynolds for the amount of the note, it is contended on behalf of the defendants that there can be no recovery, because there is but one count or cause of action stated in the petition, the object of which is to enforce a vendors lien. It is true one of the main objects of the petition is to enforce a vendors lien; but this is not the only one. Under the code all that is necessary is to state the facts in a petition, and if the plaintiff is entitled to any of the relief prayed for, that will be granted, although it may not include all, or indeed any considerable portion of the relief sought. *Johnson v. Phifer*, 6 Neb., 401. *Roberts v. Swearingen*, 8 Id., 363. The very object of the code is to abolish the technical rules that prevailed previous to its existence, by which the rights of parties were frequently sacrificed. Under the code there is but one form of action, and that consists of a statement of the facts constituting the cause of action. All distinctions between actions at law and suits in equity are abolished except such as inhere in the nature of the case. And it is the duty of the court to endeavor to protect and enforce the rights of the parties and permit no mere technicality to defeat them. The plaintiff was entitled, under the pleadings, to a judgment against Charles W. Reynolds for the amount of the note, interest and costs.

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The quit claim deed from the plaintiff to Emma E. Reynolds was not introduced in evidence, and we are therefore unable to determine its effect. We adhere to our decision in *Edminster v. Higgins*, 6 Neb., 265, that a vendor of real estate, upon an actual conveyance thereof by deed, has no lien upon the land so conveyed for such portion of the purchase money as remains unpaid. The reason is, the grantor has parted absolutely with all claims and demands upon the land, and cannot be allowed to enforce special demands against it not arising by contract or operation of law. But a vendors lien may be created by the contract of the parties at the time of the sale and conveyance of the land, and will exist where the purchase money or a part thereof remains unpaid, if the vendor has only executed a bond or contract to convey. *Stevens v. Chadwick*, 10 Kas., 406. *Smith v. Rowland*, 13 Id., 245. But as the deed is not before us we are unable to determine its character. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

AMOS PECK, PLAINTIFF IN ERROR, v. W. H. TRUMBULL,
DEFENDANT IN ERROR.

1. **Contracts:** ACTION. One T. raised a crop of wheat on shares on the land of P., the contract being that P. was to have one-half of the wheat and pay one-half of the threshing. T. procured the threshing to be done, paid one-half of the same and gave his note for the remainder, which was paid before the trial. Before the note was paid T. brought suit against P. for one-half of the threshing. *Held*, That as T. was liable for the threshing he could maintain the action.
2. **Counter-claim.** An answer setting up a counter-claim must state facts, not mere conclusions of law.

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ERROR to the district court for Lancaster county. Tried below before POUND, J. The facts appear in the opinion.

J. H. Foxworthy, for plaintiff in error.

A. C. Ricketts, for defendant in error.

MAXWELL, CH. J.

In the year 1877, the plaintiff and defendant entered into a contract, whereby Trumbull was to raise a crop of wheat in the year 1878, on certain lands of the plaintiff, the conditions of the contract being that Peck was to furnish the land and seed wheat and a man and team to assist in threshing. The wheat was raised as agreed upon, and to this point the parties agree, but Trumbull contends that Peck was also to pay one-half of the cost of threshing. This is denied by Peck and is the question in dispute. Judgment was rendered in favor of Trumbull, who was plaintiff in the court below. Peck, the defendant there, brings the cause into this court by petition in error.

The testimony is conflicting, but in our opinion there is a clear preponderance sustaining the verdict of the jury.

The court instructed the jury that: "If you find from the evidence that by the terms of the contract made between the plaintiff and defendant, the defendant was to pay one-half of the cost of threshing the wheat raised by the plaintiff on defendant's land, and if you further find that plaintiff procured the threshing to be done, and before the commencement of this action paid his share of the threshing bill and gave his note to the thresher for the share the defendant was to pay and has since paid said note, then plaintiff is entitled to recover one-half of the cost of said threshing." This instruction was excepted to and the giving of the same is now assigned for error.

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The instruction was applicable to the testimony and is not erroneous. Trumbull had employed the threshers and was liable to them for the threshing. There was no privity of contract between Peck and the threshers, and the only question to be determined is, whether Peck is liable to Trumbull for one-half of the cost of the threshing. The entire debt was not paid at the time the action was commenced, but a note had been given by Trumbull which has since been paid. This is not an action for money paid by Trumbull for the use of Peck, but upon a breach of the contract. If the jury believed from the evidence that the contract was as stated by Trumbull, and that he incurred the debt for the threshing, one-half of which Peck was to pay, he can maintain the action even without payment of the debt. And this is the only issue presented by the pleadings. But having given his note for the same and afterwards paid it, Peck has no cause of complaint because the money was not paid at once. There was no error therefore in giving the instruction.

The instructions asked on behalf of Peck were not applicable to the testimony and were properly refused. A counter-claim of \$50.00 is set up by Peck because the land was not properly cultivated, the allegations of the answer on that point being that the land "would have produced with proper cultivation and management at least twenty-five bushels of wheat per acre, amounting to five hundred bushels, but that plaintiff did not cultivate said land in a proper workmanlike and farmlike manner, but on the contrary cultivated the same in such a careless, negligent and reckless manner, that instead of producing five hundred bushels it produced three hundred and sixty-four bushels of wheat," etc. In what respect Trumbull failed to properly cultivate the land we are not informed. An answer of this kind should show in what the failure consists, whether in ploughing, sowing, harvesting or threshing, but there is no statement of facts

that would entitle Peck to recover. A counter-claim is in the nature of a cross action, and the answer in such case must show a liability on the part of the plaintiff. Bliss on Code Pleading, sec. 367. And if it fails to do so it, like a defective petition, will be unavailing. But if we treat the answer as stating a cause of action, still the proof fails to sustain it. The crop of wheat is shown to have exceeded eighteen bushels per acre and to have been above the average and the cultivation good, and whether different cultivation would have produced a greater yield must be left to conjecture and is too uncertain on which to predicate a claim for damages. There is no error in the record and the judgment of the court below is affirmed.

JUDGMENT AFFIRMED.

12 136
16 84
16 537
17 172
20 636
21 860

12 136
30 107
31 450
31 789

12 136
35 691
35 697

12 136
38 506

12 136
43 558

12 136
c50 814

12 136
60 207

JOHN O'LEARY, PLAINTIFF IN ERROR, V. HENRY ISKEY, DEFENDANT IN ERROR.

1. Trial of Appeals in District Court. When an appeal is taken from the county court to the district court, the case is to be tried in the appellate court upon the issues that were presented in the court from which the appeal is taken.
2. Error: CONFLICTING TESTIMONY. Where there is a direct conflict in the testimony, and the only question presented is the credibility of witnesses, the verdict will not be disturbed.

Error to the district court for Sarpy county. Tried below before SAVAGE, J.

A. M. Robbins, for plaintiff in error.

John Q. Goss, for defendant in error.

MAXWELL, CH., J.

This action was commenced in the county court of

Sarpy county, and judgment rendered in favor of the plaintiff for \$499.83 and costs. The defendant appealed to the district court, where judgment was rendered in his favor for seventy-one cents. A motion for a new trial was overruled and judgment rendered on the verdict. The cause is brought into this court by petition in error.

The action is based upon certain promissory notes given by the defendant to the plaintiff. The answer of the defendant in the county court was that he had paid the notes in full. In the district court he pleaded payment and also a set-off for the sum of \$542.00, the date of the items running from 1873 to 1877. No motion was made to strike the alleged set-off out of the answer, and the case was tried upon the issue thus made. Had a motion been made to strike the set-off out of the answer, it should have been sustained. Cases are to be tried on the same issue in the appellate court as in the court of original jurisdiction, with the exception that matter arising after the trial, such as payment, compromise, release, etc., may be pleaded as a defense to the action. But a set-off, arising before the commencement of the action, to be available in the appellate court, must have been presented to the court below for its adjudication. The reason is, an appeal, when a bond is given as in this case, has the effect to vacate the judgment of the court below, and presents the same issue to the appellate court, for its determination as was presented in the court below. If new issues can be raised in the appellate court it is not a trial of the same cause,—not in fact an appeal. An appeal brings up the case presented in the court below for a new trial, and the issues cannot be changed in the appellate court, except by consent, or in the manner above suggested. Cases are to be tried on their merits, then if either party is dissatisfied with the judgment he may appeal. But if he fail to make his

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defense and allow judgment to be taken against him by default, and fail to have the default set aside, and make his defense in an action tried before a justice of the peace or in the county court, he thereby waives his right to appeal. *Clendenning v. Crawford*, 7 Neb., 474. But this objection is waived if a party proceed to trial without objection upon the issue as made by the pleadings, and as there is no objection on this ground it cannot be considered.

The questions involved in this case are questions of fact, and to a great extent depend upon the degree of credit to be given to the witnesses. The testimony of the plaintiff is directly at variance with that of the defendant, and it is evident that the testimony of both of them cannot be true. This being the case, their credibility was properly submitted to the jury, and we see no cause to disturb the verdict. Whether or not the defendant is entitled to recover costs under section 102 of the code upon his set-off, is not raised by the record, and in any event the remedy is by motion to retax. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

12	138
25	387
12	138
49	509
12	138
57	667

EDWARD P. WILCOX, PLAINTIFF IN ERROR, v. SOLOMON DRAPER, DEFENDANT IN ERROR.

Guaranty. A direct promise of guaranty requires no notice of acceptance.

ERROR to the district court for Knox county. Tried below, before BARNES, J. The facts appear in the opinion.

Nelson J. Cramer and *R. E. W. Spargus*, for plaintiff in error, cited Revised Codes of Dakota, (Civil Code)

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§§ 1654, 1659, 1688, 1895. *Smith v. Dann*, 6 Hill, (N. Y.) 548. *Union Bank v. Custer Executors*, 8 New York, 203. *Douglass v. Howland*, 24 Wendell, 85. *Whitney v. Groot*, 24 Id., 82. *Allen v. Rightmere*, 20 Johns, 365. *Horsen v. Pike*, 16 Ind., 140. *McNaughton v. Conklin*, 9 Wis., 9. 1 Parsons on Contracts, 478, (note i). Id., 14, (note e). Parsons Mercantile Law, 67.

Solomon Draper, pro se.

1. The petition should have contained an itemized statement or copy of bill of goods furnished Eldridge. Maxwell's Pleading and Practice, pp. 175-6.

2. The petition should have contained a general averment of notice of acceptance of the guaranty. See *Central Savings Bank v. Shrine*, 48 Mo., 456. *Lawrence v. McCollmount*, 2 How., 426. *Louisville Manf'g Co. v. Welch*, 10 How., 461. 2 Parsons on Contracts, (sixth edition) p. 13. *Smith v. Anthony*, 5 Mo., 504. *Douglas v. Reynolds*, 7 Pet., 113. *Russell v. Clark*, 7 Cranch, 69. *Edmonson v. Drake*, 5 Pet. 624. *Lee v. Dick*, 10 Pet., 482. *Tuckerman v. French*, 7 Me., 115. *Bradley v. Carey*, 8 Me., 234. *Craft v. Isham*, 13 Conn., 28. *Oakes v. Weller*, 13 Vt., 106. *Lowry v. Adams*, 22 Vt., 166. *Babcock v. Bryant*, 12 Pick., 133. *Mussey v. Rayner*, 22 Pick., 223.

MAXWELL, CH., J.

This is an action upon a guaranty, of which the following is a copy.

"NIOBRARA, NEB., July 20th, 1878.

E. P. WILCOX, ESQ., YANKTON, D. T.

Dear Sir:—The bearer is Mr. F. Eldridge, of our town of Niobrara. He wishes to buy a bill of lumber for a house for myself and will want a short time on part of it. If you will accommodate him you will greatly oblige me and I will see you paid as he agrees. Any statement

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that he makes to you in regard to you and your brother starting a lumber yard here and purchasing wheat, you may depend upon. We are all quite anxious to have you go into that business here.

Very Respectfully,

S. DRAPER."

The petition states, that on the faith of this guaranty, the plaintiff, on the 24th of July, 1878, sold to said Eldridge a bill of lumber for the defendant's house, amounting to the sum of \$182.65, \$50.00 being paid at the time of receiving said lumber, and a credit of thirty days being given for the balance; that Eldridge executed a promissory note for \$182.65, payable at the First National Bank of Yankton, in thirty days from July 24th, 1878; that no part of the same has been paid, and that after said note became due, the plaintiff recovered judgment against Eldridge for the amount of same; that an execution was duly issued on said judgment and returned wholly unsatisfied, etc. A demurrer to the petition was sustained in the court below and the action dismissed. The cause is brought into this court by petition in error.

There is no allegation in the petition that Draper was notified of the acceptance of the guaranty. And it is claimed that such an allegation is necessary to entitle the plaintiff to recover.

In *Douglas v. Reynolds*, 7 Peters, 113-129, the action was upon the following guaranty:

"PORT GIBSON, December, 1807.

MESERS. REYNOLDS, BYRNE & Co.,

Gentlemen: Our friend, Mr. Chester Haring, to assist him in business, may require your aid from time to time, either by acceptance or endorsement of his paper, or advances in cash. In order to save you from harm in so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time for a sum not exceed-

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ing eight thousand dollars, should the said Chester Har-
ing fail to do so. Your obedient servants,

JAMES S. DOUGLASS,
THOMAS G. SINGLETON,
THOMAS GOING."

On the trial of the cause in the circuit court the defend-
ants asked the court to instruct the jury "that to entitle
the plaintiffs to recover on said letters of guaranty,
they must prove that notice had been given, in a rea-
sonable time after said letters of guaranty had been
accepted by them, to the defendants that the same
had been accepted." The opinion of the court was deliv-
ered by Story, J., who says: "It is sufficient for us to
declare, that in point of law the instruction asked was
correct and ought to have been given. A party giving a
letter of guaranty has a right to know whether it is
accepted or not. It may be most material, not only as to
his responsibility, but as to his future rights and pro-
ceedings. It may regulate in a great measure his course
of conduct and his exercise of vigilance in regard to the
party in whose favor it is given." The judgment was re-
versed, because of this and an erroneous instruction
given. The case was again before the court in 1888, and
is reported in 12 Peters, 497-506, and the rule as to notice
adhered to.

In *Lee v. Dick*, 10 Peters, 482, the action was brought
on the following guaranty, contained in a letter addressed
to the plaintiffs:

"Gentlemen: Nightingale and Dexter of Henry county,
Tenn., wish to draw on you at six and eight months. You
will please accept their draft for \$2,000.00, and we do
hereby guaranty the punctual repayment of it." It was
held that the party accepting was bound to give notice
of his intention to accept and act under the guaranty, if
not at once, at least within a reasonable time.

In *Adams v. Jones*, 12 Peters, 207, Story, J., in deliver-

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ing the opinion of the court says: "We are all of the opinion that notice is necessary; and that is not now an open question in this court, after the decisions which have been made in *Russell v. Clarke*, 7 Cranch, 69; *Edmundson v. Drake*, 5 Peters, 624; *Douglass v. Reynolds*, 7 Peters, 113; *Lee v. Dick*, 10 Peters, 482, and again recognizing it at the present term in the case of *Reynolds v. Douglass*. It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability, to exercise due vigilance in guarding himself against losses, which might otherwise be unknown to him, and to avail himself of the appropriate means in law and equity, to compel the other parties to discharge him from future responsibility."

In the case of the *Louisville Manf'g Co. v. Welch*, 10 Howard, 461-475, the court say: "The rule requiring this notice within a reasonable time after the acceptance, is absolute and imperative in this court, according to all the cases; it is deemed essential to the inception of the contract."

These decisions have been followed by the courts of a number of the states. *Mussey v. Raynor*, 22 Pick., 223. *Kay v. Allen*, 9 Barr., 320. *Kinchela v. Holmes*, 7 B. Monroe, 5. *Lowe v. Beckwith*, 14 Id., 184. *Taylor v. Wetmore*, 10 Ohio, 490. *Rankin v. Childs*, 9 Mo., 674. *Lawson v. Townes*, 2 Ala., 373. *Walker v. Forbes*, 25 Id., 139. *Fay v. Hall*, Id., 704. *Hill v. Calvin*, 4 How., (Miss.,) 231.

An examination of these cases will show that no distinction is made between a guaranty and an offer of guaranty. The same rule is applied to both. It will also be found that there is great uncertainty as to what in point of time will be sufficient notice, and what will dispense with it altogether.

In *Douglass v. Howland*, 24 Wend., 35-49, it is denied that this doctrine has the sanction of the courts of Eng-

land, or is founded on correct principles. Cowen, J., in reviewing the authorities as to notice, where the parties are acting under commercial guaranties, shows that the cases holding notice to be necessary are not sanctioned by the principles of common or commercial law, but must stand upon the reason of the rule. He says: "I am aware that there are a class of cases which hold that under a contract guaranteeing a debt, yet to be made by another, the guarantor is not liable to a suit without notice that the guaranty has been accepted and acted upon. Indeed, they go farther; if notice of accepting the guaranty be not given within a reasonable time, no debt whatever arises. *Babcock v. Bryant*, 12 Pick, 138. I will only say, that these cases have no foundation in English jurisprudence, where the adjudications are numerous and clear the other way. *Harris v. Ferrand*. Hardr., 36, 42. In Com. Tit. Plead. C., 75, it is said on a promise to pay, on the performance of an act by the promisee to a third person, the promisee need not give any notice; for the promisor takes it on himself to get notice at his peril. And *vide* as to a guaranty of a debt already due. *Warrington v. Furber*, 8 East, 242. *Swinyard v. Bowes*, 5 Maule & Sel., 62. All the cases requiring mere guarantors to be treated as endorsers, rest on dicta of two distinguished American judges, in cases of mixed character, where the defense, it was agreed, would be complete, independent of any such ground. Marshall, Ch. J., in *Russel v. Clarks, Ex'rs*, 7 Cranch, 69, 72; Story J., in *Cremier v. Higginson*, 1 Mason, 323, 340; *Russel v. Perkins*, Id., 368, 371; and *Rapelye v. Bailey*, 3 Conn. R., 438. The counsel cited no English books, and all the learned court found there was one case, in which they remark, that Eyre., C. J., seemed to have been of opinion that, in guaranties for good behavior, notice of any embezzlement ought to be given in a reasonable time. *Peel v. Tatlock*, 1 Bos. & Pull., 419. The decision was

finally rested on the dictum of Chief Justice Marshall, and was very strong in favor of the guarantor. It was on a guaranty to pay for goods deliverable to another, on such terms as the guarantee and the principal should agree on, if the principal did not pay; and though strictly followed by a sale and delivery to the principal and a default on his part to pay, it was held that no action would lie; at least, till notice of the circumstances had been given by the plaintiff to the surety. Other cases hold guarantees of this character to almost the same degree of strictness in giving notice to guarantors, as the law merchant has introduced between indorsees and indorsers. *Green v. Dodge*, 2 Ham. R., 480, 489, 440; *Norton v. Eastman*, 4 Greenl. R., 521. In the latter case, a like principle was imputed to a decision of this court in *Stafford v. Low*, 16 Johns., 67. The latter, however, merely holds that a declaration made to another of a willingness to become a guarantor, if required, would not render the declarant liable as a guarantor, without a compliance with the express condition, which means giving notice. In short, that the letter on which the plaintiff based his claim did not amount to a guaranty. *Id.* 69, 70. *McIver v. Richardson*, 4 Maule & Selw., 667, was there cited as a case of similar character. *Beekman v. Hale*, 17 Johns. R., 134, puts both of the former cases on that footing, and acts upon them, adding, there must be notice or a subsequent consent to become a guarantee. Such cases are exceptions to the general rule, that notice is not required. They are cases of express condition, like *Birks v. Tippet*, already cited from Saunders. And *vide* 1 Saund., 33 note, (2); Com. Dig. Plead. C., 69. It is proper to say that this place in Comyn's Digest is cited by Putnam, J., in *Babcock v. Bryant*. But the cases cited by Comyn are like those in the note 1 Saund. 33, where the request or notice is expressly required. "There,"

says Sergeant Williams, "the request is parcel of the contract." All the cases cited by him are of collateral matters, to be done on request, by the very words of the contract, and even these cases do not extend to a proper debt or duty of the party promising. There, though he by words, make the request or notice a condition, yet the bringing of the action is a sufficient notice, and such is the very first case cited in the note. Yelv. 66. Vide Com. Dig. Plead. C., 70. I forbear to search further for the English law, after the admission implied by *Dougllass v. Reynolds*, 7 Peters, 113, 125. The question was there examined by Mr. Justice Story. The only English cases cited by him, are: *Oxley v. Young*, 2 H. Black, 613, and *Peel v. Tatlock*, the latter being also noticed, as mentioned before, by the supreme court of Connecticut. In *Oxley v. Young*, the surety was holden liable; and I do not find any countenance given to the idea, that notice was necessary by way of condition. The defendant ordered goods for another, and guaranteed that he should pay for them. They were accordingly shipped to him by the plaintiff, the guarantee. It is true that notice of the shipment was given to the defendant; and he sought to raise a defense, on the subsequent neglect of the vendor. Eyre, C. J., said the right to sue on the guaranty attached when the order was put in a train for execution, subject to its being actually executed; and the right could not be divested, even by the wilful neglect of the vendor. As to *Peel v. Tatlock*, it has been impossible for me to perceive that even an intimation was intended of notice being essential. The difficulty felt by Eyre, C. J., seems to have been, whether the creditor had not defrauded the guarantor by industrious concealment. I may then, I think, repeat with great confidence, that all the cases requiring notice are American, and depart from the rule of the common law. *Dougllass v. Reynolds* may be sustained by the dictum of C. J. Marshall; and

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indeed by *Edmundston v. Drake*, 5 Pet., 624, where the court, with that learned chief justice at its head, carried the dictum into a direct adjudication. No English case is claimed by Mr. Justice Story, in any of his decisions, as sustaining the doctrine in the least. C. J. Marshall does not even cite one in his opinions. The short answer which English cases, decided long before our revolution, furnish, is, that the guarantor, by inquiring of his principal, with whom he is presumed to be on intimate terms, may inform himself perfectly, whether the guaranty were accepted, the conditions fulfilled, and payment made. Where that can be done, the cases all hold that notice is not necessary, even as preliminary to the bringing of an action, much less to found a right of action. The only exception is the well known one of collateral parties to bills of exchange or promissory notes. Vide *Phillips v. Astling*, 2 Taunt., 206."

The supreme court of Ohio in *Powers and Weightman v. Bumcratz*, 12 Ohio State, 284, after quoting a portion of the above opinion, say: "We have carefully examined the cases of *Oxley v. Young*, 2 H. Bl., 618, and *Peel v. Tatlock*, 1 Bos. & Pull., 419, and cannot see how the fairness and correctness of the comment upon them of Cowen, J., before quoted, can be denied or disputed. If there be English cases sustaining the doctrine of *Douglas v. Reynolds*, they have not been cited in the decisions of the courts of the United States. In several of the cases decided in the state courts English cases are cited. In *Craft v. Isham*, 18 Conn., 28, 39, which, though decided before *Douglass v. Howland*, had not been reported, and is therefore not referred to by Cowen, J., it is said, as to the decisions in *Douglass v. Reynolds*, and *Adams v. Jones*, that, "so far from being opposed to, or unsupported by, authorities, they are founded on principles which have long since been settled, and are familiar in Westminster Hall. We barely refer to the authorities."

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The cases cited are: *McIver v. Richardson*, 1 Maul & Sel, 557; *Gaunt v. Hill*, 1 Stark. Ca., 10; *Symons v. Want*, 2 Stark. Ca., 371; *Payne v. Ives*, 3 Dowl. & Ry., 664; *Glyn v. Hertel*, 8 Taunt., 208; *Bacon v. Chesney*, 1 Stark. Ca., 192; *Combe v. Wolf*, 8 Bing., 156; *Phillips v. Astling*, 2 Taunt., 206; *Morris v. Cleasby*, 4 Maul. & Sel., 566. The bearing on the point of some of these cases it is difficult to perceive. *Bacon v. Chesney* was the case of a guaranty for goods to be sold on eighteen months credit, and it was claimed that there had been a credit of only twelve, but it being shown there was a mistake, the plaintiff recovered. In *Coombe v. Woolf*, the guarantor was held to be discharged by the giving time without his consent. In *Phillips v. Astling*, the guaranty was the price of goods to be paid by a bill, and the question was as to notice of its non-payment. In *Morris v. Cleasby*, there had been a sale by a factor on a *del credere* commission. It was said such a commission pre-supposes a guaranty, and that the obligation of the factor arises on the guaranty. "The guarantor is to answer for the solvency of the vendee, and to pay the money, if the vendee does not; on the failure of the vendee he is to stand in his place, and to make his default good. Where the form of the action makes it necessary to declare upon the guaranty, application to the principal must be stated on the record. In all cases it must, if required, be proved, though in the case of a foreigner, very slight evidence may be sufficient." 4 M. & S., 574. It will be seen that in none of these cases is there anything as to the acceptance of a guaranty, and so far as any of them bear on the doctrine of notice imposed by the contract, and that in reference to a collateral liability for the payment of a bill of exchange. 2 Taunt., 206."

The supreme court of Ohio in the case cited, after an elaborate review of the cases, overruled *Taylor v. Wetmore*, 10 Ohio, 490. The court say, page 262: "We are

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aware of the importance of adhering to former decisions, but do not think we are bound by an opinion which it was not necessary to express and evidently was expressed without a thorough consideration of the question."

The guaranty in *McIver v. Richardson*, was in these words: "I understand A. & Co., have given you an order for rigging, etc., which will amount to about four thousand pounds. I can assure you from what I know of A's honor and probity, you will be perfectly safe in crediting them to that amount; indeed I have no objection to guaranty you against any loss from giving them this credit." The court say the question was "whether the paper imports to be a perfect and conclusive guaranty. The paper therefore must be construed according to the plain natural import of its terms. The import is, that the party signing it understood that A. & Co. had given an order for goods amounting to about £4,000.00; that this order remained unexecuted; and then, as if a question had been put to the defendant respecting the honor or probity of A. & Co., the defendant says: I assure you from what I know of A. you will be perfectly safe in crediting them to that amount; and then added: indeed, I have no objection to guaranty you against any loss from giving them credit; which words import, that if application was made he would guaranty, etc. Considering this as a mere overture to guaranty, it appears to us that the defendant ought to have had notice that it was so regarded, and meant to be accepted, or that there should have been a subsequent assent on his part to convert it into a conclusive guaranty." 1 M. & S., 563.

In *Symons v. Want*, 2 Stark., 371, the offer of guaranty was as follows: "I have no objection to guaranty the payment of the rent as far as that of each quarter during Mr. T. Want's continuance in possession." The court directed a non-suit upon the ground that it was a mere offer to guaranty, and no request to guarantee or notice

of acceptance of the offer was proved. See also *Mozley v. Tinkler*, 1 C. and M., 692.

But it may be said that the guaranty in this case being indefinite as to the amount of the debt, and time for which credit should be given, notice was therefore required. This question was raised in *Powers and Weightman v. Bumcratz*. The court say, pages 291-2: "We have examined some of those cases, in which the guaranty being indefinite as to the amount and time of the advances, something might be expected in the pleadings, or points made, as to the notice of the acceptance of the guaranty, but nothing of the kind appears. *Johnson v. Nichols*, 1 C. B., 251. *Chapman v. Sutton*, 2 Id., 634. *Boyd v. Moyle*, Id., 644. *Martin v. Wright*, 6 Q. B., 917. *Bell v. W. P. Bank of England*, 9 C. B., 154. *Harlor v. Carpenter*, 3 J. Scott, 172. *Hitchcock v. Humfrey*, 5 M. & G., 559. *Mayer v. Isaac*, 6 M. & W., 605. *Liverpool Borough Bank v. Eccles*, 4 H. & N. Exch. 139. *Allen v. Kenning*, 9 Bingh., 618.

In the case of *White v. Woodward*, 5 C. B., 810, 814, it was claimed by counsel that: "The declaration should have averred notice to the defendant within a reasonable time after the supply of the goods." He said this question was first broached in *Peel v. Tatlock*, 1 B. & P. 419, and notice held necessary by Dr. Story in *Cremer v. Higginson*, 1 Mason, 323, and 1 Story, R. 22, 33. Cresswell, J., said: "Suppose the defendant had no notice of the supply to Slater, and no notice of the non-payment by him, until the amount was demanded of him. What then?" The counsel replied: "The demand, if within a reasonable time, would be notice." Wilde, C. J., "You do not show that it was not within a reasonable time. The defendant was liable *ipso facto*, upon Slater's failure to pay." Such is the only mention of the doctrine as to notice of acting on a guaranty, we have been able to find in the English reports."

In the case of *Smith v. Dann*, 6 Hill, 543, the guaranty was as follows :

"AVON, October 10, 1840.

MESSRS. E. F. SMITH & Co.,

Gentlemen: If you will let Messrs. Steele & Wall of this village, grocers and bakers, have one hundred dollars in goods at your store on a credit of three months, you may regard me as guarantying the payment.

Yours Truly,

AMOS DANN."

It was held that no notice was necessary. The court say: "The defendant invited the plaintiffs to sell goods to Steele and Wall, on his promise to guaranty the payment of the debt. The plaintiffs assented and delivered the goods. The proposition of one party was accepted by the other; and according to our notions of the law, this made a complete contract. Nothing further was necessary to its consummation. If the defendant wanted notice, and did not get it from the persons whom he thought worthy of credit, it was his business to enquire and ascertain what had been done. There is nothing in the defendant's undertaking which looks like a condition, or even a request, that the plaintiff should give him notice if they acted upon the guaranty; and there is no principle upon which we can hold that notice was an essential element of the contract. * * * The cases of *Beckman v. Hale*, 17 Johns, 134, and *Stafford v. Low*, 16 Id., 67, went upon the ground that there was nothing more than an overture or proposition. But here the undertaking was absolute."

In the case of the *Union Bank v. Coster's Executors*, 3 Comstock 203, the letter of credit and guaranty were as follows :

"NEW YORK, 29th May, 1841.

Sir: We hereby agree to accept and pay at maturity

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any draft or drafts on us at sixty days sight, issued by Messrs. Kohn, Daron & Co., of your city, to the extent of twenty-five thousand dollars, and negotiated through your bank. We are respectfully, sir,

Your obedient servants,

HECKSHER & COSTER."

At the foot of the letter of credit was the following guaranty: "I hereby guarantee the due acceptance and payment of any draft issued in pursuance of the above credit, John G. Coster." The court say: "We must hold the law to be settled in this state that where the guaranty is absolute, no notice of acceptance is necessary. Judge Cowen in *Douglass v. Howland*, 24 Wend., 85, and Judge Bronson in *Smith v. Dann*, 6 Hill, 543, examined the cases at length upon this question, and showed conclusively that by the common law no notice of the acceptance of any contract was necessary to make it binding, unless it be made a condition of the contract itself, and that contracts of guaranty do not differ in that respect from other contracts.

In *Carman v. Ellege*, 40 Iowa, 407, and *Case & Co. v. Howard*, 41 Id., 479, it was held that a direct promise of guaranty requires no notice of acceptance. See also *Farmers & Mechanics Bank v. Kerchival*, 2 Mich., 504; *Thrasher v. Ely*, 2 S. & M., 141; *Williams v. Stanton*, 5 Id., 347; *Wadsworth v. Allen*, 8 Grattan, 504; *Moore v. Holt*, 10 Id., 284—296; 2 Am. Leading Cases, 103.

The question here involved is presented to this court for the first time. A desire to conform our rulings, where the authorities are conflicting, to those of the supreme court of the United States, and thus secure uniformity of decisions, inclines us to follow the cases decided by that court. But it is of much greater importance that decisions shall be based upon sound principles and correct law. The rule as to notice in case of guaranty was unknown to the common law, yet it is sought

to engraft it on our jurisprudence as a common law rule, —to attach conditions to the contract of guaranty which are not applied to other contracts. When a proposition of guaranty of one party is accepted by the other, this makes a complete contract. The proposition is made to the person of whom the credit is desired, and he accepts it. Upon what principles of law can it be said that this proposition, which was intended to be accepted and to take effect from that date, should not be binding on the guarantor without notice? The guarantor makes the person whom he vouches for and thinks worthy of credit, so far his agent as to transmit the written guaranty by him. Is it not the business of the guarantor to enquire of him about what has been done under the guaranty? We think it is. We therefore hold that a direct promise of guaranty requires no notice of acceptance. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

12	182
12	124
12	152
27	311
19	152
36	754
12	152
41	612
12	152
43	516
12	152
50	657

ALFRED HARRISON, APPELLEE, v. DAVID MCWHIRTER, APPELLANT.

Deed: TITLE. A deed of real estate executed, witnessed and delivered, is effectual to pass title, though not lawfully acknowledged or recorded.

APPEAL from York county. Tried below before Post, J. The case is stated in the opinion.

Scott & Conner, for appellant.

1. Title passes without acknowledgment. *Burbank v. Ellis*, 7 Neb., 164.

2. If the "function of an acknowledgment is to authorize the deed to be given in evidence without further

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proof of its execution, and to entitle it to be recorded," and if "the acknowledgment is no part of the deed itself," then further proof *could* be made as to its execution, to entitle it to be given in evidence or to authorize its registration, and as a necessary sequence the deed is not void for the reason that it is not acknowledged, nor because the notary affixes his certificate without a personal appearance of the grantor. Then this deed stands with respect to rights of the creditors of the grantor in the light of a prior unrecorded conveyance; and it is not enough for the plaintiff to show merely that he is a judgment creditor of the grantor. His claim must be evidenced by some instrument *required to be recorded*. *Galway v. Malchow*, 7 Neb., 285. The case of *Heelan v. Hoagland*, 10 Neb., 518, is not in point here.

Montgomery & Harlan, for appellee.

The appellant claims that the deed is good as between the parties. That is not the issue; we believe it is as void as to creditors as though it never had been signed, and especially would this be the case when the grantor was insolvent, and the grantee connived and conspired with another to place upon said deed a false and fraudulent certificate of acknowledgment. We think the case of *Heelan v. Hoagland*, 10 Neb., 511, fully settles this case. The same law applies to the acknowledgment of deeds of assignment which applies to general conveyances of real estate.

COBB, J.

The petition in the court below—after setting out the recovery of a judgment by the plaintiff against one John M. Grant, in the district court of York county, at the January term, 1879; that there had previously issued an order of attachment in said cause, which order of attachment had been levied upon certain real estate of

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said John M. Grant, including the lot in question; that after the rendition of said judgment an order of sale was issued in said cause out of said court; that said real estate was, under said orders of attachment and sale, offered for sale by the sheriff of said county of York, but not sold for the want of bidders; that the reason why the same was not sold was that the said John M. Grant had, at the time of the levy of said order of attachment on the north half, etc., no title or interest whatever therein, but that the title thereto was in the United States, and that the reason why lot 12, in block 32, was not sold at said sale, was that said William McWhirter, defendant, caused to be made on the 21st day of November, 1878, a pretended deed and conveyance from said John M. Grant to him, the said William McWhirter, grantee to and for said lot 12, in block 32, in said town of New York, and caused said deed to be recorded, thereby casting a cloud on the title of said lot, and preventing the same from selling—charges that the said deed is fraudulent in this, that said defendant William McWhirter, combined and conspired with one Henry Kleinschmidt, (a notary public), to make and execute a false and fraudulent certificate of acknowledgment to said deed by said John M. Grant, when in fact and in truth said Grant did not appear before Henry Kleinschmidt and acknowledge such deed of conveyance as aforesaid, etc., and that said Grant is insolvent.

A general demurrer to the petition was overruled, and such further proceedings had that a judgment was rendered for the plaintiff.

It will readily be seen that the plaintiff does not attack the *bona fides* of the execution or delivery of the deed, either on the part of the grantor or grantee, but only the acknowledgment of the same. So that, as it appears to us, the case turns upon the single question—does the title to real estate pass by the proper execution

and delivery of a deed, or does the title remain in a state of abeyance or suspension until the deed is acknowledged and recorded? There are two provisions of the statute applicable to this question. The first is found in chapter 82 of the Compiled Statutes, usually called the statute of frauds. Section three, of said chapter, is as follows: "Nō estate or interest in land, other than leases for a term not exceeding one year, nor any trust or power over, or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, or surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning or surrendering the same."

Upon the language of this section, the first question must be answered in the affirmative, and that neither acknowledgment or recording is necessary to pass the title from grantor to grantee.

The other provision referred to, section one, of chap. 73, Comp. Statutes, provides that: "Deeds of real estate or of any interest therein in this state, except leases for one year or for a less time, must be signed by the grantor, being of lawful age, in the presence of at least one competent witness, who shall subscribe his name as a witness thereto and be acknowledged or proved, and recorded, as directed in this chapter."

The most that can be said of this provision is that it adds one to the requisite qualities of a deed at common law — that it be witnessed. A deed thus executed and delivered is clearly good and effectual to pass the title as between the parties and those having actual notice thereof. And such deed with immediate actual and notorious physical possession of the granted premises under it, is good against all the world. The office of the words: "and be acknowledged or proved and recorded, as directed in this chapter" is directory, for the purpose of making such deed notice to persons not having actual notice

thereof, in the absence of possession by the grantee under such deed.

As before stated the petition contains no allegation impeaching the conveyance as between the parties thereto, nor does it contain the necessary allegations to give the plaintiff a standing in a court of equity, being deficient for that purpose in many respects. We are of the opinion therefore that the court erred in its judgment, overruling the demurrer to the petition, and the same is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

12	156
37	643

AMANDA B. NOAKES, PLAINTIFF IN ERROR, v. S. S. SWITZER,
AND OTHERS, DEFENDANTS IN ERROR.

Trial of right of property: UNDERTAKING. In an attachment case in the county court the chattel property attached was claimed by plaintiff in error, a third party. Proceedings before a justice of the peace for trial of the right of property. The jury found the right of property in the claimant, and the justice ordered it delivered to her. Whereupon the plaintiff presented to the officer executing said attachment an undertaking signed by three persons, not by herself, binding themselves "to the claimant in the sum of two hundred and ninety-four dollars, to the effect that we will pay all damages sustained by reason of the detention or sale of such property." On suit in the district court by the said claimant against the signers of said undertaking, the district court ruled out the undertaking, when offered by the plaintiff as evidence to the jury. *Held* error, and judgment for defendants therein reversed.

ERROR to the district court for Gage county. Tried below before WEAVER, J. The bill of exceptions consists of an agreed statement of facts, as follows:

It is agreed by the parties that by an order of attachment in favor of John Koskis and against Thomas L.

Noakes, that under said attachment personal property was seized as the property of Thomas Noakes. That said attachment was issued out of the county court, and that Amanda Noakes notified the sheriff that she claimed said property as hers ; and that such proceedings were had as that the trial of the right of property took place before J. B. Rutherford, a justice of the peace in Gage county, Nebraska, wherein it was found by said justice that the claimant, Amanda B. Noakes, was the owner of the property, and the said justice ordered the return of the property to said claimant, as provided by law, and that subsequently thereto the defendants executed their bond in writing to the claimant as follows :

Whereas, The sheriff of Gage county has caused an order of attachment to be levied on certain personal property, as the property of Thomas Noakes and Thomas L. Noakes, and

Whereas, A portion of said property has been claimed by Amanda B. Noakes, to-wit : One sorrel mare, one bay mare named Dolly, one bay mare named Musty, blind, one double light harness, one double buggy and one heavy harness ; and

Whereas, J. B. Rutherford has, by an order based upon a finding of a jury, November 7th, 1870, commanded said sheriff to turn over said property to said claimant, now therefore, we bind ourselves to the claimant in the sum of two hundred and ninety-four dollars, to the effect that we will pay all damages sustained by reason of the detention or sale of said property.

S. S. SWITZER,
G. B. REYNOLDS,
CHARLES S. SCHELL.

Approved by me November 10th, 1879,

EUGENE MACK,
Sheriff of Gage Co., Neb.

Plaintiff offers in evidence the above bond. Defendants object to the introduction of the bond.

First. Where execution issues from a county court, as in the present case, the statute makes no provision for the execution of a bond to the claimant.

Second. That the statute gives a complete, full and perfect remedy by an action against the sheriff and his bondsmen, and that any bond that could have been given or executed in this case, should have been made to the sheriff, and not to the claimant.

Third. Where the statute gives a remedy, that must be pursued. That this is no statutory bond, and not a bond executed in pursuance of law, and a failure in this action would be no bar against the sheriff and his bondsmen.

Fourth. That the petition does not state facts sufficient to constitute a cause of action, with or without the bond.

Objection sustained; plaintiffs except to ruling of the court. Bond excluded. Verdict and judgment for defendants.

Sabin & Smith and O. P. Mason, for plaintiff in error.

1. The plaintiff's petition shows that the property was seized by virtue of an order of attachment issued out of the county court of Gage county, hence, the attachment on which the property was taken issued from a court of record. This undertaking offered in evidence, if not a literal, was a substantial compliance with the statute, and should have been admitted in evidence, and the court below erred in excluding the same. *Storms v. Eaton*, 5 Neb., 453.

2. Sureties in an undertaking or bond of this character, are estopped from denying the recitals in the undertaking. In such cases the estoppel is equitable as well as legal, because it would be unjust to permit per-

sons who have aided another to obtain the property of the plaintiff and sell and apply the same to the payment of the debt of a stranger, and thus obtain the property of the plaintiff by means of their intervention with an undertaking of this character, to deny or question the recital in their bond after it was too late to correct the error. Herman on Estoppel, 278, and authorities cited.

Bush & Rickards, for defendants in error.

1. This attachment having issued out of the county court and the proceedings being the same as proceedings under execution, it follows that the law must be complied with in that respect. Gen. Stat., sec. 19, p. 267. The law or procedure, when the execution or attachment is issued out of the county court by a justice of the peace, is very different from the procedure when the same is issued out of the district court. We are aware, however, that the constitution, article VI, section 16, also G. S., sec. 1, on page 263, provides that county courts are courts of record. Notwithstanding all this the statute in these kind of cases has provided the procedure. Hence the ruling and judgment of the court below.

2. The undertaking was properly excluded. The procedure to try right of property should have been had under sec. 996-998, instead of 486-488. By section governing this case, if sheriff or constable sells the property, he does so at his peril. If the judgment is adverse to the judgment creditor, he may indemnify the constable or sheriff, when the constable or sheriff may disregard the order of the justice in relation to the rights of the claimant and proceed to sell the property, and if he does sell, notwithstanding the order of the justice to deliver the property to the claimant, such constable or sheriff will be liable to the suit of said claimant. *State v. Powell*, 10 Neb., 48. *Armstrong v. Hervey*, 11 Ohio State, 527.

Noakes v. Switzer.

Claimant has a remedy at law against sheriff and his bondsmen.

COBB, J.

Whatever may have been the intention of the legislature in providing two different modes of proceeding in cases of property taken on execution or attachment being claimed by third persons, one applicable to proceedings in courts of record, and the other to proceedings before justices of the peace; and, although the provisions of the general statute makes "the provisions of the code of civil procedure, relative to justices of the peace, where no special provision is made in this sub-division," apply to the proceedings in all civil actions prosecuted before said probate judges," and whatever may have been a correct application of the facts presented in this case, had it arisen while such provisions remained unaffected by subsequent provisions, it is very clear that they must now be construed in the light of the provisions of our present constitution applicable thereto.

Probate courts were unknown to the laws of this state at the date of the proceedings in this case; they having been abolished by the constitution and county courts provided in their stead, which latter courts were by express provision of said constitution made courts of record. Therefore all provisions of statute applicable to courts of record in general, where no special provision to the contrary exists, must be held to apply to them. And as the proceedings on the part of the plaintiff in error appear to have been substantially in accordance with such provisions, we think the district court erred in excluding the undertaking from the jury.

While the undertaking set out in the petition and agreed case is not one that we would recommend as a model, yet the defendants in error fail to point us to any respect in which it fails to comply with the law, and we

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think that it embraces all the substance of a good undertaking, and is binding upon the parties executing it.

The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

JAMES TURNER, PLAINTIFF IN ERROR, v. JOSEPH TURNER,
DEFENDANT IN ERROR.

1. **Bill of Exceptions.** A referee has authority to sign a bill of exceptions which may contain all the evidence taken by him, but to be available where objection is made that the finding is not supported by the evidence, his certificate must show that the bill contains all the evidence.
2. ———. Such bill of exceptions is not to be signed by the judge, and is not subject to the provisions of section 311 of the code, for settling bills of exceptions.

ERROR to the district court for Nuckolls county.

H. W. Short & R. Wyant, for plaintiff in error.

D. W. Barker, for defendant in error.

MAXWELL, CH. J.

This is an action for an account. In the year 1880 the defendant filed a petition against the plaintiff in the district court of Nuckolls county, to recover the sum of \$2,273.62 with interest, and costs. An itemized copy of the account is set out as an exhibit and made a part of the petition. The plaintiff in error, (defendant in the court below), in his answer denies the facts stated in the petition, and pleads a counter claim against the plaintiff for the sum of \$3,586.85. The case was referred by consent to J. P. Hammond, clerk of the district court, to

12	161
24	410
12	161
30	654
12	161
24	158
35	308
12	161
42	53
42	654
12	161
62	311

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take the testimony and find the facts. The plaintiff submitted thirty-six questions to the referee for special findings, and the findings thereon seem to be satisfactory. The referee also found that there was due from the plaintiff herein to the defendant a balance amounting to \$697.02. The plaintiff herein moved to set aside this report, and assigned fourteen grounds of objection, nearly all of which are that certain findings are not sustained by the evidence. There is no bill of exceptions and nothing before us from which we can determine whether the report is sustained by the evidence or not. There is a large amount of testimony which purports to have been taken by the referee, and at the close of the same is the following: "The foregoing evidence was taken by referee J. P. Hammond."

Sec. 803 of the code provides that: "It shall be the duty of the referees to sign any true exceptions taken to any order or decision by them made in the case, and return the same with their report to the court making the reference." A referee is here given authority to sign a bill of exceptions, and this bill may contain all the evidence, and must do so if necessary to determine the questions raised. Such a bill of exceptions is not required to be signed by the judge, but by the referee alone, and is not subject to the provisions of section 811 of the code, for settling bills of exceptions.

In the case at bar there is nothing before the court showing that what purports to be a bill of exceptions contains all evidence, and therefore it is impossible for us to review the findings. The evidence in the record, however, fully sustains the judgment, and if it is all the evidence in the case, substantial justice has been done. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

PETER JENAL, PLAINTIFF IN ERROR, v. THE GREEN ISLAND DRAINING CO., DEFENDANT IN ERROR.

Construction of Drains. Drains or levees for the reclamation of wet or overflowed lands can be constructed across the lands of others, and the cost assessed thereon, except by consent, only in cases where the public welfare will be subserved.

ERROR to the district court for Cedar county. Tried below, before BARNES, J. The opinion states the case.

B. Boyd and Marlow & Munger, for plaintiff in error.

The act is unconstitutional. Sec. 20, Art. I., Constitution. Sedgwick Constitutional Law, 447. *Reeves v. Treasurer of Wood County*, 8 Ohio State, 333. *Harward v. St. Clair Drain Co.*, 51 Ill., 130. *Hessler v. The Drainage Co.*, 53 Ill., 105. *Gage v. Graham*, 57 Ill., 144. *Board of Directors v. Houston*, 71 Ill., 318.

Wilbur F. Bryant and Gantt & Norris, for defendant in error, cited *inter alia*, *Norfleet v. Cromwell*, 70 North Car., 634. Mills on Eminent Domain, Sec. 12. 2 Dillon Mun. Corp., 555. *Turner v. Althaus*, 6 Neb., 71. *Talbot v. Hudson*, 16 Gray, 417. *Concord R. R. v. Greeley*, 19 N. H., 47. *Anderson v. Kerns Draining Co.*, 14 Ind., 199. *Etchison Association v. Busenback*, 39 Ind., 362. *Cooley Const. Lim.*, 581, 667. *Ahern v. Dubuque*, 48 Iowa, 140. *Beekman v. Saratoga R. R.*, 3 Paige, 71. *State ex rel Abbott v. Dodge County*, 8 Neb., 134.

MAXWELL, CH. J.

This action was commenced in the district court of Cedar county, to enforce an alleged lien of the defendant upon certain lands of the plaintiff. A demurrer to the petition was overruled in the court below, and the plaintiff electing to stand on his demurrer, judgment was rendered

12	163
38	775
12	163
43	268
12	163
45	894

Jenal v. Green Island Draining Co

in favor of the defendant hereir. The plaintiff brings the case into this court by petition in error.

The question to be determined is—was the demurrer properly overruled? The petition states in substance that the plaintiff, (defendant in error) is a corporation organized under an act of the legislature approved Feb. 19th, 1877, entitled "An act to authorize the construction of levees, dykes and drains, and the reclamation of wet and overflowed lands by incorporated companies;" [Comp. Stat., 520.] that said corporation was organized for the purpose of constructing a drain from the Missouri river in township 33, range 1 east, thence south or southwest until the tract of land known as the lake or lakes and lands contiguous thereto and all lands likely to be benefited by said drain be fully drained; that after said corporation was duly organized it made application to the county court of Cedar county for the appointment of appraisers, who were duly appointed, and after due notice made an assessment of the benefits to the lands to be affected by said ditch, and duly returned said assessment to the secretary of said corporation, and such assessment with an affidavit attached thereto was afterwards filed in the office of the county clerk of said county, and duly recorded; that prior to the actual construction of said work or any part thereof, surveys of the same were made, and the estimated cost did not exceed the aggregate of the assessments; that in April, 1878, an assessment of ten per cent. upon the gross amount assessed upon the lands benefited was made and placed in the hands of the treasurer of said corporation for collection; that additional assessments amounting to twenty per cent. upon the gross assessment were afterwards made and placed in the hands of said treasurer for collection; that Peter Jenal is the owner of the following described lands (giving description) affected by the construction of said drain upon which there is now due the sum of \$80.40 with inter-

est, and praying that said lands may be appraised, advertised and sold and the money arising therefrom may be applied in payment of said sum, etc.

Sec. 1, of "An act to authorize the construction of levees, dykes and drains, and the reclamation of wet and overflowed lands by incorporated companies" provides that: "Any number of persons not less than three, being owners of lands wet or liable to be overflowed, may organize a company for the purpose of draining, reclaiming and protecting such lands, which shall have power to straighten, deepen and make new channels for the whole or any part of a river, or water course, and to construct any dykes, drains, levees and breakwaters, and to do everything which they shall deem proper to accomplish the purposes for which the company shall have been organized."

Sections 2, 3 and 4 provide the mode of organizing and electing officers, and filling vacancies in the office of directors.

Sec. 5 provides for the management of the affairs of the company.

Sec. 6 provides that the company may apply to the district court, or county court in term time, or to a judge thereof in vacation, for the appointment of three appraisers, who shall assess the benefits along the line of said drain and file a schedule of such assessment in the county clerks office, etc., and providing that such assessment shall be a lien on the lands thus assessed from the date of filing such assessment, and providing for an appeal, etc.

Sec. 7 requires surveys and the actual cost of the work to be made, before the actual construction of the work.

Sec. 11 provides for the foreclosure of the lien.

Sec. 12 provides that: "The company may appropriate any land, stone, timber, gravel, or other materials necessary for the right of way, or the construction, mainten-

ance, or improvement of their proposed work, by first paying into the county treasury of the county where the land is situated, for the use of the owner of the land, the amount of damage assessed by said appraisers to him therefor."

The other sections of the act refer to the powers of the corporation, to which it is unnecessary to call attention. The act is copied in part from the law of Indiana on that subject, but leaving out several important provisions for the protection of land owners.

The plaintiff contends that inasmuch as the act authorizes an appropriation of private property for private, and not for the public welfare, that it is unconstitutional and void.

Blackstone says: "The third absolute right * * * is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. * * * The laws of England are therefore in point of honor and justice extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseized or divested of his freehold, or of his liberties, or free customs, but by the judgment of his peers or by the law of the land." Cooley's Blackstone, 137.

Sec. 21, Art. I., of the constitution, provides that: "The property of no person shall be taken or damaged for public use, without just compensation therefor." The legislature possesses no authority, however, to take the property of one citizen and transfer it to another, even where full compensation is made. *Reeves v. Treasurer*, 8 Ohio State, 346; *Cooper v. Williams*, 5 Ohio, 393; *Osborn v. Hart*, 24 Wis., 90; *Bankhead v. Brown*, 25 Iowa, 540. The law guarantees to every one the free use and enjoyment of his property, and he can be required to surrender it only when it is required for public use, and upon full compen-

Lininger v. Raymond.

sation being made. The statute in question authorizes the entry upon lands and construction of drains, whenever the private interest of the corporation requires it, and without reference to the public welfare. Any number of persons, not less than three, being the owners of wet and overflowed lands, whenever it is for their interest, may locate a ditch across the lands of others. There is no requirement in the act that the corporation shall act only in cases where the public welfare would be advanced. And there are no conditions upon which their right to locate a ditch depend, except that they are the owners of wet or overflowed lands. A ditch may be located and opened across the lands of individual owners merely to subserve private interests. Three individuals, by forming a corporation, may locate and open a drain across the property of others without their consent, and compel them to bear the burden of constructing the same. This is an infringement of the right of private property, and is unauthorized and void. Even the board of county commissioners have no authority to authorize the location or construction of drains, except where they "will be conducive to the public health, convenience or welfare." The assessment being unauthorized, the petition fails to state a cause of action. The judgment of the district court is reversed and the case remanded.

REVERSED AND REMANDED.

JACOB B. LININGER, PLAINTIFF IN ERROR, v. ISAAC M. RAYMOND, AND OTHERS, DEFENDANTS IN ERROR.

An assignment for the benefit of creditors sustained. Rehearing denied.

APPLICATION for rehearing of the case, *ante* p. 19.

Harwood & Ames, for the application.

MAXWELL, CH. J.

12	187
13	800
18	578
12	187
33	306
12	187
049	178

Linsinger v. Raymond.

The defendants move for a rehearing in this case upon certain specified grounds, that will be considered in their order.

First. It is objected that the assignment was never entered on the numerical index, nor recorded in the deed record, but only in the miscellaneous record.

It appears from the stipulation of facts, and also from the record itself, that the deed of assignment was made on the 30th day of January, 1878, and filed for record on the next day.

Sec. 1 of the act "relating to voluntary assignments for the benefit of creditors," approved February 19, 1877, provides that: "In every case in which any person shall make a voluntary assignment of his estate, real or personal, or both, or any part thereof, to any person or persons in trust for his creditors, it shall be the duty of the assignee or assignees within thirty days after the execution thereof, to file in the office of the clerk of the district court, in the county in which the assignor shall reside, an inventory of all the estate or effects so assigned, accompanied with an affidavit by such assignees that the same is a complete inventory of all such estate and effects, so far as the same has come to their knowledge."

Sec. 2 provides for the appointment of appraisers.

Sec. 3 provides that the assignees shall give bond, etc.

Sec. 4 requires the assignee to give notice of his appointment and of the filing of claims.

Sec. 5 provides that the assignment shall inure to the benefit of all creditors in proportion to their demands, laborers to the extent of \$100.00 to be paid in full.

Sec. 7 provides that "all assignments so made and executed as aforesaid, which shall not be recorded in the office of the recorder of deeds in the county in which real estate so assigned is situated, within thirty days after the execution thereof, shall be considered null and void, as against any of the creditors of said assignor, and sub-

sequent bona fide purchasers without notice." [Comp. Stat., Chap. 6.]

Sec. 78, of Chap. 18, Comp. Stat., provides that: "The county clerk shall be ex-officio register of deeds, and shall have the custody of, and safely keep and preserve, all books, records, maps, and papers kept or deposited in his office; he shall also record or cause to be recorded, in suitable books, all deeds, mortgages, instruments and writings, authorized by law to be recorded in his office, and left with him for that purpose."

Sec. 82 provides that: "Different sets of books shall be provided for the recording of deeds and mortgages; in one of which sets all conveyances absolute in their terms, and not intended as mortgages, or as securities in the nature of mortgages, shall be recorded; and in the other set such mortgages and securities shall be recorded."

Sec. 87 provides that: "The county clerk shall also keep a separate book, to be called the "Miscellaneous Record," in which all papers, instruments, and writings not entitled to be recorded in any of the books hereinbefore provided for, shall be recorded."

The miscellaneous record would seem to be the proper book in which to enter an assignment, and therefore we must hold that it was properly recorded.

Second. A great deal of stress is laid upon the fact that four days prior to the assignment, the assignors delivered to one Gillan, promissory notes in the aggregate to the amount of \$1,050.00, in payment of \$350.00 not then due. It is claimed this transaction being fraudulent on their part, invalidated the whole assignment. In other words, that the intention of the assignors to defraud would of itself render an assignment, otherwise fair, void. Every assignment of property to a trustee is, to some extent, a hindering and delaying of creditors, and is void as to the cred-

itors, if the property is not to be applied to the payment of their debts. And when, instead of distributing his property among his creditors as far as it will go, the assignor places it beyond their reach by an assignment, for the purpose of preserving it for his own use, or that of a friend, courts do not hesitate to declare such assignment void, because under the pretext of an assignment, the debtor has concealed or prevented the application of his property to the payment of his debts. But where the debtor parts with all control of his property, and devotes it absolutely to the payment of his debts without reservation, the advantage to creditors is clear and direct, and although there may be delay in the payment of the debts, still the assignment is not fraudulent and will not be declared void.

In the case at bar the deed of assignment contains these provisions: "For the said consideration aforesaid, to him so paid as aforesaid, hereby sells, assigns, grants, and conveys unto the party of the second part, all his lands, tenements, hereditaments, goods, chattels, property, choses in action of every name, nature and description, wheresoever the same may be," etc. The assignee is a trustee for the creditors. Under such an assignment he may sue for, and recover any money or property belonging to the trust estate, no matter where the same may be. If Mr. Gillan has received money or property belonging to the assignors without consideration, or to which he is not entitled, it is the duty of the assignee to institute an action to recover the same. Under our statute claims must be allowed against the estate, and any one interested therein may attack any claim for cause. The assignee is under the control and direction of the district court, and it is the duty of such assignee to collect and apply the whole estate to the payment of the debts as speedily as possible. The court should require the utmost good faith on his part, and should see to it

The State v. Leidtke.

that the trust is faithfully and speedily executed. An assignment making an equal distribution of the debtor's property among all his creditors is favored in law, and being equitable in its character will receive, so far as may be, the favorable consideration of the court. There is no error in our former ruling, and the judgment heretofore rendered is affirmed.

JUDGMENT ACCORDINGLY.

THE STATE OF NEBRASKA, EX REL THE ATTORNEY GENERAL, v. F. W. LEIDTKE, AUDITOR OF PUBLIC ACCOUNTS.

12	171
16	111
28	608
19	171
29	480
12	171
c53	838
c53	850

Fees of State Auditor. By sec. 24, Art. V, of the constitution, all fees earned or collected by the auditor of public accounts belong to the state, and are payable in advance into the state treasury. Fees for services performed by the auditor in making "statements for publication of life insurance companies, and procuring the same to be published, and issuing duplicate certificates, for both fire and life insurance companies" are no exception to this rule.

ORIGINAL application for mandamus. An alternative writ was issued at July Term 1880, and upon a hearing thereof, with return of respondent, and report of referee appointed to take testimony, a peremptory writ was awarded.

The alternative writ was as follows:

The State of Nebraska,

To F. W. Leidtke, auditor of public accounts of said state: *Whereas* it has been suggested to our supreme court, sitting in Lincoln, in said state, that you have ever since the 9th day of January, 1879, held the office of auditor of public accounts, duly qualified and now acting in that capacity; that during the time you have held said office, you as such auditor of public accounts, have received

the following amounts of money, to-wit: the sum of \$1,165.37 as office fees as auditor of public accounts, and also the sum of \$7,498 fees received on account of insurance, making in all the sum of \$8,663.37, that said sums of money were received by you for fees charged as provided by law, and paid into your office of auditor of public accounts by different persons and insurance companies doing business in this state, and that during the same time you have also received the amount of salary provided for by the constitution at the rate of \$2,500 per annum; that of said sums of money so as aforesaid received as fees, you have paid into the state treasury the sum of \$1,103, leaving the amount of \$7,560.37, which is now in your hands, and which it is your duty, as such auditor of public accounts, under the constitution and laws of the state of Nebraska, to pay into the state treasury; that, on the 28th July, 1880, in response to a demand on that behalf, duly made by Albinus Nance, governor of said state, directing you to pay said sum of \$7,560.37, into the state treasury, you refused and still refuse so to do:

Now therefore, we being willing that speedy justice should be done in the premises, do command, that immediately upon the receipt of this writ, you pay into the state treasury the said sum of \$7,560.37, or that you appear before the supreme court, at Lincoln, on Thursday, August 12, 1880, and have you then and there this writ with your return hereon of having done as you are hereby commanded, etc.

To the above the defendant made the following return:

And now comes the defendant, F. W. Leidtke, and for answer to the alternative writ of mandamus issued herein, admits that he is the duly elected and qualified auditor of public accounts of the state of Nebraska, and that since the 9th day of January, 1879, he has held said office and been acting in that capacity. That during the time

he has been acting as auditor of public accounts, as aforesaid, he has received as office fees belonging to said office for services rendered as auditor of public accounts, the sum of one thousand one hundred and sixty-five dollars and thirty-seven cents, and no more, and he alleges that he has paid all of said sum into the treasury of the state of Nebraska, and that he now holds the state treasurer's receipts for said amount.

And the defendant further answering, says that between the 9th day of January, 1879, and the commencement of this proceeding, there has been paid to him by the insurance companies doing business in this state, for labor and services performed by him and his employees under the law, entitled: "Insurance companies," for examining the divers statements filed in his office by said insurance companies as required by sections 20 and 23 of said act, and for examining into the standing of said companies and issuing certificates of renewal as required by section 25 of said act, and for issuing certificates of authority to the various agents of said companies throughout this state, as required by section 24 of said act, the sum of six thousand, eight hundred and fifty-two dollars. But this defendant alleges that the services rendered by him and his employees as aforesaid constituted no part of his official duties as auditor of public accounts, but wholly separate and distinct therefrom, and that the services rendered by him for the insurance companies were reasonably worth the amount received by him therefor.

And the defendant further answering, says that he has performed divers services for the various insurance companies doing business in this state, outside of any official duty, and has expended money and incurred obligations, at the instance and request of the said companies, which services consisted in preparing statements for publication of life insurance companies and procuring the same to be published, and issuing duplicate certificates for both fire

and life insurance companies, the examination and publication of which statements, and the issuing of such duplicate certificates, are not required by any law of this state, but which services were rendered by this defendant outside of his official duties for said companies at their instance and request, and for which said companies paid this defendant the sum of six hundred and forty-six dollars.

And this defendant further says that the services rendered by him for the insurance companies as last aforesaid, were reasonably worth \$646.00. That there is no law directing or requiring this defendant to render the services for which the amount of money last aforesaid was paid, and that said money was not, nor any part thereof, collected as fees due under any statute of this state, and that the rendition of said services were no part of the duties imposed upon him by law as auditor of public accounts.

And the defendant further answering admits, that during the time he has discharged the duties of auditor of public accounts, he has drawn his salary as stated in the writ.

And the defendant further answering, denies each and every allegation in said writ, not hereinbefore specifically admitted or denied.

C. J. Dilworth, Attorney General, in personam.

Brown & Marshall and Mason & Whedon, for respondent.

LAKE, J.

The sole question presented upon this relation and the agreed facts, is simply whether the fees collected by the respondent, while acting as auditor of public accounts, for services rendered by him in administering the act relative to "Insurance Companies," belong to the state, or to him. In view of the following provision of the con-

stitution of this state, the question seems to us to be a very simple one.

Sec. 24, Art. V., after fixing the salaries of various state officers, including that of the auditor of public accounts, provides that, "they shall not receive, to their own use, any fees, costs, interest upon public moneys in their hands or under their control, perquisites of office, or other compensation, and all fees that may hereafter be payable by law for services performed by any officer provided for by this article of the constitution, shall be paid, in advance, into the state treasury."

According to this provision, strictly speaking, all such fees should be paid in advance of the performance of the required service into the state treasury, the treasurer giving proper vouchers therefor, to be retained by the officer in his office as evidence of the required amounts having been so paid. But, inasmuch as the respondent received the fees in question to himself, and still retains the moneys, he must be held to have taken, and to hold them, in trust, for the use of the state, and in duty bound to hand them over to the state treasurer, the lawful custodian thereof.

As to the greater part of these fees, it is admitted that they were received by the auditor for strictly official duties required by said act, but the respondent contends that six hundred and forty-six dollars thereof were for services not official, which the insurance companies might have dispensed with, and which he was under no obligation to perform, but which he nevertheless did perform in compliance with their request. These particular services are described by the evidence as consisting of the preparation of "statements for publication of life insurance companies, and procuring the same to be published, and issuing duplicate certificates for both fire and life insurance companies." These fees, it is strongly urged, the respondent is entitled to retain as his own, in

any event. But we think otherwise; for although the services for which they were charged may not have been entirely indispensable to the proper enforcement of the law, they were at least semi-official, and were performed by him as the agent of the state, whose obligations and duties preclude the idea that he could, at the same time, be in the private service and pay of the insurance companies. This act for the regulation of insurance companies is an important one, and its due observance essential to the protection of the inhabitants of the state against manifold impositions and wrongs. It vests in the auditor of public accounts a large discretion, and very grave responsibilities, and public policy, as well as the due execution of the law, requires that he have no divided allegiance in its enforcement.

Section 32, of the act, provides the following fees, viz: "For examining and filing of the first application of any company, and issuing of the certificate of license thereon, fifty dollars, * * *; for filing each annual statement herein required, twenty dollars; ~~for~~ for each certificate of authority, two dollars; for every copy of paper filed as herein provided, the sum of ten cents per folio, and fifty cents for certifying the same, and affixing the seal of office thereto." Now if the auditor, in violation of the law, exact larger fees than are here provided, or if the companies take a greater number of certificates of authority than are necessary, or folios of written matter that could be dispensed with, such excess does not go to the benefit of the officer, but, like any other portion of fees earned by him, to the state, whose servant he is; and under the provision of the constitution that "all fees that may hereafter be payable by law for services performed by" such officer, must be duly accounted for. Such being our views, we must hold that all of these fees belong to the state, and a peremptory writ as prayed is granted.

WRIT ALLOWED.

SAMUEL J. HOWELL AND THOMAS GIBSON, PLAINTIFFS IN
ERROR, v. THE WILCOX & GIBBS SEWING MACHINE
Co., DEFENDANT IN ERROR.

1. **Partnership Name:** USE OF. One member of a partnership has no right to give a promissory note in settlement of his individual debt, unless duly authorized by his co-partner, or it is afterwards ratified by him.
2. ———. Evidence reviewed and held to be inadequate to prove either assent or ratification.
3. **Instructions to Jury.** When, in consequence of a mis-statement of the pleadings, an instruction has a tendency to confuse or mislead the jury, it is good ground for a new trial.

ERROR to the district court for Douglas county. Tried below, before SAVAGE, J. The facts appear in the opinion.

Kennedy & Gilbert, for plaintiffs in error, cited, *Lansing v. Gaine*, 2 Johns., 300. *Foot v. Sabin*, 19 Johns., 154. *Whitaker v. Brown*, 11 Wend., 75. *Tallmadge v. Penoyer*, 85 Barb., 120. *Livingston v. Hastie*, 2 Caines, 246. *Dubois v. Roosevelt*, 4 Johns., 262. *Williams v. Walbridge*, 3 Wend., 415. *Joice v. Williams*, 14 Wend., 141. *Elliott v. Dudley*, 19 Barb., 326.

C. J. Green, for defendant in error.

LAKE, J.

In November, 1876, Howell, one of the plaintiffs in error, in his individual capacity, and for himself alone, entered into an arrangement with the defendant in error to canvass for the sale, and sell its sewing machines in this state, and in the territories of Wyoming and Utah. For a number of the machines, and other property, received by him from the company in pursuance of this arrangement, Howell incurred the indebtedness for which the notes in controversy were finally given, in satisfaction of his individual notes which had matured.

Shortly after Howell had made this arrangement, and incurred the indebtedness, he entered into negotiations with his co-plaintiff in error, which resulted in their becoming associated under the firm name of S. J. Howell & Co., for the prosecution of that portion of the business relating to Wyoming and Utah; Howell's relation to the sewing machine company remaining unchanged, and he retaining that branch of the business to be done in Nebraska to himself. Thus far the facts are conceded, or abundantly proved, and there is really no controversy between the parties respecting them.

And it is also established by undisputed evidence, that, owing to the failure of Howell to obtain from the sewing machine company the requisite number of machines to enable Gibson, who was to take personal charge of the business in Wyoming and Utah, to prosecute the work with vigor as he had arranged, not a single machine was sold in either of those territories, and nothing beyond mere preparation, by way of correspondence and distribution of printed circulars, was done toward carrying out the scheme for which the firm of S. J. Howell & Co. was formed.

The first error assigned, and the one most relied on is, that the verdict of the jury is not sustained by sufficient evidence, and its consideration will require a brief examination of the pleadings, and the testimony bearing upon the issues thereby formed.

We find that the notes on which the action was brought were executed in the name of S. J. Howell & Co. The action is against Howell and Gibson in their individual capacities. As before shown, they were given in renewal of the individual notes of Howell alone, and for an indebtedness to which Gibson was not, originally at least, a party. In his separate answer, Gibson, after reciting the before mentioned arrangement between the sewing machine company and Howell, alleges that he

"never in any manner incurred, nor assumed any liability, either in respect to the purchase of said machines, or upon said promissory notes, or either of them; and never, in any manner, authorized, or consented to the execution of said promissory notes, or either of them, in the name of S. J. Howell & Co.," etc.

To this answer there is no reply, and we might dispose of the case, as to Gibson, upon the ground that, by the admitted facts, no liability is shown, but we prefer to examine this question by the light of the testimony. It being conceded that Gibson was not in any manner connected with the original transaction between Howell and the sewing machine company, it follows that he could not, without his individual assent, be rendered liable for Howell's indebtedness on that account. It is a conceded fact that these renewal notes were actually signed by Howell. Unless duly authorized by Gibson, Howell had no right to thus use the name of S. J. Howell & Co. As was well said by the district judge, in his charge to the jury: "The notes, having been given for a debt incurred prior to the formation of any connection between Messrs. Howell and Gibson, are not a valid claim against Mr. Gibson, unless he authorized the signing of the firm name, or ratified Mr. Howell's action after learning that he had so signed."

The testimony chiefly relied on to show that Gibson authorized this use of the firm name, is that of two witnesses, Hemingway and Tallman, taken by deposition. The first of these witnesses was in the employ of the defendant in error at Omaha before and at the time Howell gave the first notes. It is quite evident from the testimony that, in giving it, she was laboring to connect Gibson with them, and to show that he regarded himself as jointly liable with Howell thereon. Her testimony is as to what transpired before the notes in dispute were given. For instance, she swears that she called upon both Howell

and Gibson for payment "on account of indebtedness to the company for machines sold," by turning over some of the machines then on hand, and that "Mr. Gibson said they had already turned over all they could spare," that "they complained of hard times, and a general reduction in prices. Mr. Gibson said that he thought the company ought to help, but that if it would not, then we can stand it ourselves." She says: "I urged payment, and Mr. Gibson said he had no loose money by him then. Between them, they said they would like to give new notes. Whether Mr. Howell or Mr. Gibson first said this, I don't know. They were both together, and we talked that matter over between us, and we all discussed the question of new notes to be given by them for an extension. In speaking of giving new notes, they said 'we.' Howell did not say 'I,' nor did Gibson speak of them as being Howell's notes alone. Mr. Gibson wanted the company to help them by taking notes for a less amount, that is, to deduct something from what I supposed were Howell's old notes, and it was in that way that he wanted the company to help them, and said that if the company would not do so, we can stand it ourselves. I would not do this, then they said they would give new notes for an extension. They said that was the best they could do. Mr. Howell brought me, before I went away, no money, nor did Mr. Gibson, as they could not raise any cash at that time. They promised to send me money as soon as they could raise it; and I received \$55.50 from them after I got to Saint Joseph. When I left Omaha they had given me to understand that they would give the extension notes. Neither of them denied the indebtedness, on the contrary spoke of the amount as owing by them frequently."

For several reasons, the entire truthfulness of this witness is doubtful. It is not claimed that, up to the time of her alleged conversations with Gibson, he had in any

way become a party to Howell's indebtedness to the sewing machine company, and yet she would convey the idea that he had evinced to her as much interest in the matter as if he were a principal therein, promising payment from time to time, and actually sending her at Saint Joseph the sum of \$55.50 on account of the original notes. As to Gibson, her story is not only unreasonable in view of the conceded facts, but she is flatly contradicted in important particulars by all of the other witnesses, even by Tallman, another witness of the defendant in error, who made all of the contracts, and took both the original and renewal notes. As to the small payment sent to her, as she swears, by both Howell and Gibson, Tallman says in his testimony, that "he, Howell, paid to our agent, Miss Hemingway, fifty or fifty-five dollars, according to her report," so that her report to Tallman and her testimony cannot both be true. But even if the fullest credit were to be given to all she says, its only effect as between these parties would be to show that Gibson was interesting himself in Howell's business, and was at that time merely willing to aid him in procuring an extension of time, by joining with him in renewal notes; for, that he was under any legal obligation to the sewing machine company, prior to the date of the notes in controversy, is neither claimed nor shown. Tallman, who acted for the company in making all of the contracts with Howell, and who took both the original and renewal notes, states explicitly that he had nothing to do with Gibson, and did not even know him, until the day he took the notes in controversy.

The question, whether Gibson actually became a party to the renewal notes, must be settled, mainly, as we think, by what actually occurred on the day they were given, for although he may have been willing to aid Howell by lending his credit, yet if he neither authorized Howell to use it, nor ratified its use afterwards, surely he cannot be

held liable. Gibson not only swears positively that he did not authorize the execution of the notes in the name of S. J. Howell & Co., but that he had no knowledge even of its having been done, until after they had matured; and in this he is fully corroborated by Howell, who it is conceded actually affixed the signature to them.

Against the explicit and positive testimony of both Gibson and Howell, that such use of the partnership name was wholly unauthorized by the former, we have nothing but Tallman's recollection of the matter. He swears that on the day the notes were given he came to Omaha "with the view of securing or collecting money due us from Samuel J. Howell," not from S. J. Howell & Co. That he was much pressed for time, having only a "very few hours, perhaps three or four, possibly five, in which to transact business with Mr. Howell, driven twelve miles in the country and back, and then got train for St. Louis that same day." To save time, he says, he took Mr. Howell with him on his drive to the country, and on the way talked over the matter of settlement, and arranged to take back "a portion of the stock remaining in his hands and credit the value of the same upon the past due notes then in our hands against him, we to receive about fifty dollars in money; the balance of eight hundred dollars then due to be paid by the notes of S. J. Howell & Co." This it will be observed is stated as the result of the interview between himself and Howell alone. He swears further, that on his return to Omaha, he saw Gibson and told him of the conclusion to which he and Howell had come, and that he was willing to take back a portion of the stock, "receive about fifty dollars in money, and the balance in the notes of S. J. Howell and Thomas Gibson. Mr. Gibson and Mr. Howell consented to the arrangement, and delivered to me four notes of S. J. Howell & Co., in settlement of the balance." That "S. J. Howell signed for the Company," in his presence, and

in the presence of Gibson. He further says, that he took the notes "in a good deal of haste," and that his "interview with Howell and Gibson would not exceed twenty minutes." He had seen Mr. Gibson "never before or since."

Conceding to this witness the utmost good faith in all he says of this interview, it by no means proves, against the positive denials of both Howell and Gibson, nor even without these denials would it be satisfactory, that Gibson authorized the signature of S. J. Howell & Co. to these notes. He does not claim to give the precise language used on this occasion, and it is admitted that he could not, but only "*the gist of it.*" He says, he told Gibson that, for the balance, he was willing to take "the notes of S. J. Howell and Thomas Gibson," not the notes of S. J. Howell & Co. The proposition then, it appears, was to take individual notes, while those executed and delivered by Howell, were of the firm of S. J. Howell & Co. Then, again, as to Gibson's assent to the arrangement, this is a mere conclusion of the witness; no facts are stated from which the court or jury could safely conclude that such assent was given. We cannot accept the conclusion of this witness, whose story was given without cross-examination, the weight of evidence in the establishment of this principal ultimate fact. That Howell gave his assent is evident, for he personally affixed the signature of the firm, and delivered the notes; but not so Gibson, who neither signed them, nor, so far as is shown by probative facts, in any manner, by word or deed, authorized this use of their firm name.

A careful reading of the testimony brings us to the conclusion that an overwhelming preponderance of legitimate evidence supports the claim of Gibson, that he neither authorized nor consented to such use of the name and credit of his firm, and consequently that the verdict in this particular is unsupported by the evidence.

Howell and Gibson v. Sewing Machine Co.

It is contended also, that the second instruction to the jury was erroneous. By it the jury were told that: "The defendants answer, that by a certain written agreement made at the same time of the giving of the notes, of which these now in suit are the renewals, the plaintiff agreed to furnish *them* sewing machines at certain agreed prices," etc. As to Howell's answer, this statement was substantially correct, but as to Gibson's it was not. Separate answers were filed, and in Gibson's, the agreement referred to by the judge in this instruction is mentioned thus: that "Samuel J. Howell entered into a contract with the plaintiff, *in his own personal right and interest*, * * * whereby, and in consideration that said S. J. Howell should open and maintain a retail office and sales room for the sale of the plaintiff's sewing machines exclusively, * * * said plaintiff would furnish *to said Howell* all the machines necessary for that purpose," etc.

It is apparent that this instruction was a very serious mis-statement of Gibson's claim respecting his attitude to the original indebtedness, as given in his answer, and may have caused the jury to understand that he was in some way a party to the former contract between Howell and the sewing machine company, and, therefore, justly liable for machines furnished, in the language of the instruction, "*to them*." The fact that in a subsequent instruction the jury were properly told, as before shown, that the new notes were not a valid claim against Gibson "unless he authorized the signing of the firm name," etc., will not cure the defect, for if the jury were not in fact misled by the error, its tendency was to confuse and mislead them, which of itself we have held to be good ground for a new trial. *Mutual Hail Insurance Company v. Wilde*, 8 Neb., 427.

As to the plaintiff in error, Howell, we see nothing in the record of which he can justly complain, but, the judg-

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DeClerq v. Hager.

ment being joint, for the errors against Gibson it must be set aside and a new trial ordered.

REVERSED AND REMANDED.

ARNOLD M. DECLERQ, APPELLEE, v. LEVI D. HAGER, AND OTHERS, APPELLANTS.

12	186
16	610

1. **Constitutional law: AID TO WORKS OF INTERNAL IMPROVEMENTS: LIMITATION AS TO, BY COUNTIES.** The limitation upon county indebtedness, imposed by sec. 2, Art. XII, of the Constitution, relates solely to such as is created to aid in the construction of works of internal improvement.
2. ———: ———. Bridges built by a county upon the line of its highways and wholly within such county, are not "works of internal improvement," according to the constitutional meaning of that term; and money raised and expended therefor cannot be counted as a donation to a work of internal improvement.

THIS was an action, brought in the district court for Franklin county, to enjoin the defendants, county commissioners and county clerk, from issuing \$30,000.00 of bonds voted to aid in the construction of the Republican Valley Railroad Company. The bonds were voted in June, 1878. The assessed value of taxable property for that year was \$302,000.00. The petition alleged this fact, and further that there were outstanding bonds to the amount of \$18,000.00, and certain unpaid county warrants. Also that school bonds to the amount of \$6,000.00 had been issued. Upon a trial below before GASLIN, J., a decree was rendered enjoining the issuance of the bonds. Defendants appeal.

T. M. Marquett, for appellant.

The petition on its face shows that the indebtedness for the \$18,000.00 was one incurred by borrowing money upon the bonds of Franklin county. There is no author-

ity under the internal improvement act for borrowing money and issuing bonds therefor. *Adams v. Ills.*, 82 Ill., 183. 1 McCrary, 377. *Scipio v. Wright*, 11 Otto, 666. *Thayer v. McCarty*, 3 Dillon, 389. Kansas Statutes, 510. *Lawrence v. Wood*, 102 U. S. Repts. (12 Otto), 298. *Hosier v. Board of Higgins*, 7 N. W. Reporter, 897.

Mason & Whedon, for appellee, cited *Reineman v. C. C. & B. H. R. R.*, 7 Neb., 310.

LAKE, J.

At first, without much reflection, and in deference to the opinion of the district judge, I was disposed to hold that the petition states a cause of action, but upon a fuller examination I am forced to the conclusion that it does not.

The constitutional inhibition upon the creation of municipal and county indebtedness involved in this case is as follows: "No city, county, town, precinct, municipality, or other subdivision of the state, shall ever make donations to any railroad, or other work of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof, at an election by authority of law; *Provided*, That such donations of a county, with the donations of such subdivisions, in the aggregate, shall not exceed ten per cent. of the assessed valuation of such county," etc.

This limitation, it is apparent, is not upon the creation of indebtedness generally, but merely of that caused by "donations" to railroads, "or other works of internal improvement." It is very clear, therefore, that as to so much of the indebtedness relied on to defeat the proposed issue of bonds to the Republican Valley Railroad Company, as is represented by school district bonds, and the unpaid county warrants, no constitutional objection to the threatened action of the board of county commission-

ers exists. The indebtedness thus described was not created by donations to any work of internal improvement, and cannot be counted in filling the constitutional limit to which such aid may go.

But, is the remaining indebtedness set out in the petition thus restricted by the constitution? It is described as follows: "That on the first day of June, 1878, the said county of Franklin was indebted for money borrowed upon bonds of said Franklin county heretofore issued under and in pursuance of the provisions of an act entitled "An act to enable counties, cities and precincts to borrow money on their bonds, or to issue bonds to aid in the construction of works of internal improvement in this state, and to legalize bonds already issued for such purposes," passed February 15th, 1869, and the various amendments thereto, in the sum of eighteen thousand dollars of principal, and two thousand dollars interest; and that said bonds were on said first day of June, 1878, wholly unpaid, and a valid and subsisting charge against said county of Franklin."

The above is the entire description of said indebtedness. It is simply that the bonds were issued under the act to enable counties, etc. to aid in the construction of works of internal improvement, but omitting all mention of the use to which the bonds, or the money raised thereon, was put. In short, the petition does not show, and the inference from what is alleged would be violent in the extreme, that the county of Franklin had aided to the extent of a single dollar "any railroad or other work of internal improvement." Therefore it would seem that the objection made on behalf of the defendants to the introduction of any evidence, on the ground that the petition did not state a cause of action, was well taken, and should have been sustained. From this conclusion I see no escape. But even taking the case, as made by the evidence, and the plaintiff's attitude is

not at all improved, for it certainly shows no cause of action. By this it is established that these eighteen thousand dollars in bonds were neither voted, nor used, as "donations to any railroad, or other work of internal improvement," but to pay for one county bridge already constructed, and to build another, across the Republican river in said county.

The question, whether the means for such works could be lawfully raised under the act of February 15th, 1869, is not now before us. However this may be, it is very clear that the use to which the eighteen thousand dollars in bonds were put was not a donation by the county at all, but an expenditure merely of so much money, whether legal or otherwise, in the improvement of its ordinary highways, of which bridges are a part. *The People v. The Commissioners of Buffalo County*, 4 Neb., 150.

For these reasons the judgment of the district court must be reversed, the injunction dissolved, and the petition dismissed at the costs of the plaintiff. The other judges concur.

JUDGMENT ACCORDINGLY.

12	188
14	68
18	188
26	513
12	188
32	339
12	188
36	691
12	188
38	263
12	188
40	791
41	419
12	188
42	769
12	188
45	625
12	188
56	482

MARTHA J. COURTNEY, APPELLANT, v. THOMAS PRICE, AND OTHERS, APPELLEES.

1. **Usury.** It is a settled rule of this court that if an agent, intrusted with the business of loaning money, exacts for its use, either directly or indirectly, interest in excess of the legal rate, the transaction will be judged usurious. Rule applied.
2. **Review of Questions of Fact.** Another rule is that the findings of trial courts upon questions of fact will not be interfered with, unless clearly unsupported by the evidence. Rule applied.
3. **Practice: QUESTIONS NOT RAISED IN THE TRIAL COURT.** In its appellate jurisdiction, the province of this court is, generally, to review the rulings of inferior tribunals, duly

Courtney v. Price.

excepted to at the time of being made, and to correct such of them as are found to be erroneous; not the consideration of questions first raised after the case is brought here, unless they be those of jurisdiction.

4. ———: DEFENSE OMITTED. If a defendant in the trial court omit a defense upon the merits which he might have made, he will, in this court, be bound by the case made by the pleadings and evidence, as exhibited by the records.

THIS was an action in district court for Lancaster county, for the foreclosure of a mortgage, given by defendants to secure a note of \$1,000, payable to Henry Atkins, and by him assigned to plaintiff. Defense—usury, and the court, POUND, J., presiding, so found. Decree for plaintiff for \$536.65, and judgment against her for costs. She appeals.

Courtney, Caldwell & Northrop, for appellant.

Galey & Abbott, for appellees.

LAKE, J.

It is a settled rule of this court that if an agent, intrusted with the business of loaning money, exacts for its use, either directly or indirectly, by whatsoever shift or device, interest in excess of the legal rate, the transaction will be judged usurious. *Philo v. Butterfield*, 3 Neb., 256. *Cheney v. White*, 5 Id., 261. *Same v. Woodruff*, 6 Id., 151. *Same v. Eberhardt*, 8 Id., 423.

Another rule equally well established is that, upon questions of fact, this court will not interfere with the finding of a trial court, unless it is clearly unsupported by the evidence. *Armstrong v. Freeman*, 9 Neb., 11. *Graham v. Kibble*, Id., 182. And the finding will be considered supported, unless there be a clear preponderance of evidence against it. *Young v. Pritchett*, 10 Id., 352. *Helling v. Mortgage Security Co.*, Id., 611. Tested by these rules, how stands the case we are now considering?

It is conceded that the plaintiff took the note and se-

curity after maturity, so that, if the plea of usury would have been good against the original payee, it is now good as to her. Among the facts brought out in evidence, and which seem to be undisputed, is a very important one testified to by Henry Atkins, the payee of the note, called on behalf of the plaintiff, viz: That the making of this particular loan to Price, as well as others made about the same time, was intrusted solely to the judgment and discretion of his agent, D. G. Hull, who made it, and exacted the interest reserved. We quote as follows from his testimony:

Q. Did you see or know anything in regard to the loan that was made by Mr. Hull to Mr. Price, the note of which is in controversy to-day?

A. I did not.

Q. Did you know anything about it till after it was consummated?

A. Not till after.

Q. Did you allow Mr. Hull to use his own judgment in regard to the way he loaned this money?

A. He used his own judgment in that loan so far as I am concerned, for I did not know anything at all about it.

Q. Was he in the habit at this time of having written applications, and referring them to you?

A. No.

The amount of this loan was nominally one thousand dollars. The note was for that amount. Of this Price actually received seven hundred and eighty dollars only, the residue going to pay one year's interest, in advance, at the nominal rate of twelve per cent., and one hundred dollars charged by Hull for his services. It is this charge made by Mr. Hull which it is claimed renders this loan usurious.

Price in his own behalf testified that "a week or so before this money was got, I met Mr. Hull in the city,

and he said he had got an agency to loan money, and if any of the people down there wanted to borrow, send them up, he had money to loan." And as to the money from which this loan and others were about that time made by him, Hull swears it came from Atkins, by means of a draft for a little less than five thousand dollars to one Maton, a friend, and subsequently a brother-in-law of Atkins, and was deposited to his (Hull's) credit. The money was, therefore, intrusted to the keeping and care of Hull, and, from all the testimony, it is very clear, was loaned out upon his sole judgment as to the security to be required. That Hull was Atkins' agent the evidence leaves no room for doubt.

And Price also testified that, "when he," (Hull), "came to balance, he took out one hundred dollars, and I told him he should retain fifty dollars less. He said that Mr. Atkins allowed him five per cent. for attending to the business, and keeping it straight, and he would have to take the amount, he could not wait for next year." Hull was on the stand as a witness, but he did not deny that he so said to Price. Being true, the legitimate inference from this testimony would seem to be that as to the five per cent. commission, at least, the transaction was usurious; Price being willing that the other fifty dollars should be kept, probably, for Hull's services in drafting papers, taking acknowledgments, etc. Hull, in answer to the question: "What was said about your commission?" answered, "I could only judge by what I ordinarily said." But what he "ordinarily said" does not appear. He seems to have had no recollection on this particular subject, and left the statement of Price to stand entirely uncontradicted. It seems that, regarding this transaction generally, Hull's recollection was not good, as he conceded by saying that he knew "what the arrangement was, but could not give the conversation." He could give conclusions, but not the facts upon which they were

based, which is not at all satisfactory to a court in determining issues between parties. For these considerations, we see no reason for interfering with the conclusion of the district court, that the loan in question was usurious. We might refer at greater length to the testimony, but to do so would be of no particular use, therefore we abstain.

As a second ground for reversal, it is contended that Price was estopped from making the defense of usury in this case, for the reason that he failed to make it in another foreclosure suit, brought by Atkins, before he parted with these securities, against that portion of the mortgaged estate lying in Otoe county, wherein a decree for the amount claimed, a sale, and a partial satisfaction were obtained. This point is first made in this court. It is merely suggested in the petition, and also in the answer, that such proceeding had taken place in the district court for Otoe county, but the decree there was not plead as an estoppel, nor was it even referred to on the trial below. The judge's attention was not called to it; and the trial of the question of usury was entered upon, and proceeded with by the examination of witnesses, precisely as if no prior suit had been instituted, or decree rendered. In its appellate jurisdiction the province of this court is, generally, to review the rulings of inferior tribunals, duly excepted to at the time of being made, and to correct such of them as are found to be erroneous; not the consideration of questions first raised after the case is brought here, unless they be those of jurisdiction. In civil cases especially, the rulings of trial courts, upon questions not of jurisdiction, and their action generally within the scope of their jurisdiction, unobjected to, must be regarded as satisfactory to the parties, and not to be interfered with on appeal. And if a defendant in the trial court omit a defense upon the merits which he might have made, and submits issues

not involving it, he will, in this court, be bound by the case made by the pleadings and evidence, as exhibited by the record.

JUDGMENT AFFIRMED.

GEORGE D. NOBLE, AND OTHERS, PLAINTIFFS IN ERROR, V.
STEPHEN HIMEO, AND OTHERS, DEFENDANTS IN ERROR.

1. **Liability of constable.** One S., who kept a drug store had certain patent medicines belonging to H. & Co. for sale on commission. A constable with an execution against S., levied the same upon the property of H. & Co., and sold the same, although notified that S. was not the owner of it. *Held*, That the constable and his sureties were liable to H. & Co., for the value of the property.
2. ———: **BOND.** The law requires a constable to give a bond, but makes no provision as to the amount of the penalty. The amount of the penalty is not material to the validity of the bond and is a mere limitation.

ERROR to the district court for Fillmore county. Tried below, before WEAVER, J. The facts appear in the opinion.

Eller & Chase, for plaintiffs in error.

1. A man cannot stand by and see his property sold under an execution against another without opposition, and then claim the property. *Danmiel v. Gorham*, 6 Cal., 44. *Bond v. Ward*, 7 Mass., 123. *Taylor v. Seymour*, 6 Cal., 512. *Vose v. Stickney*, 8 Minn., 79. *Wellington v. Sedgwick*, 12 Cal., 476. *Killey v. Scannell*, 12 Cal., 78. *Dunlap v. Berry*, 5 Ill., 327. *Lewis v. Whittmore*, 5 N. H., 577.

2. The law does not prescribe a bond for constable. Gen. Stat., 99, sec's 2, 5. The bond sued upon is, "That we ——— firmly bound unto the county of Fillmore and state of Nebraska in the penal sum of \$500.00." The

12	193
12	507
12	193
33	507
12	193
53	775

amount prescribed by law for a constable's bond is not \$500.00, and the sureties cannot be held for a greater amount than the law prescribes. A statutory bond must be in the amount required by law. *Shuttleworth v. Levi*, 13 Bush, (Ky.), 195. *Cutler v. Roberts*, 7 Neb., 4. *Gregory v. Cameron*, 7 Neb., 414. The board of county commissioners have no authority to fix the amount of a constable's bond. 3 Neb., 42. *Miller v. Commissioners*, 1 Ohio, 271.

3. A bond taken and approved by a tribunal not authorized by law to take such bond is wholly void. *Caffery v. Dudgeon*, 38 Ind., 512.

John P. Maule, for defendants in error, cited *Ohio v. Jennings*, 4 Ohio State, 419. *People v. Schuyler*, 4 New York, 173. *Kane v. U. P. R. R.*, 5 Neb., 107. *Williams v. Golden*, 10 Neb., 432.

MAXWELL, CH. J.

In August, 1877, the Sandwich Enterprise Company recovered a judgment for the sum of \$314.75 against Lorenzo Snow, in the county court of Fillmore county, upon which an execution was issued in October of that year, and delivered to George D. Noble, a constable, who levied upon certain patent medicines of the value of \$35.05, in the possession of Snow, but belonging to Himeo & Co., and sold the same under said execution and paid the proceeds to the plaintiff in execution. This action is brought by Himeo & Company against the constable and his sureties, upon his official bond, for the value of said medicines, and judgment was rendered in the court below in their favor for the sum of \$34.05. Noble and his sureties assign various errors in the record, the more important of which will be noticed in their order.

First. It is objected, that the first instruction given by the court on its own motion, is erroneous. It is as follows: "The plaintiffs in this case sue to recover the

value of certain property levied on by the defendant, Noble, and sold by him as constable to satisfy a certain judgment against Lorenzo Snow, and if you shall find from the evidence that the property set out in plaintiffs' petition was so levied on and sold by the defendant, Noble, to satisfy a judgment against said Snow, and if you further find, that the said property was at the aforesaid times the property of the plaintiffs, S. O. Himeo & Co., and if you shall further find that at the time the levy was made, said Geo. D. Noble was notified that a portion of the goods levied upon did not belong to said Snow, and that he proceeded to sell the property of plaintiffs, without attempting to ascertain to whom said goods belonged, then you will find for the plaintiffs, and assess their damages at an amount equal to the value of the goods so sold belonging to plaintiffs."

Judge Cooley in his work on Torts, page 396, says: "Wrongs by a sheriff to others than the parties to suits are generally a consequence of his mistakes or his carelessness. Thus, he may, on an execution against one person, by mistake seize the goods of another. He must at his peril make no mistakes here. It might be urged that, in such cases, the sheriff should have the ordinary protection of judicial officers; for he must inquire into the facts, and he must decide upon the facts who the owner is. But this does not render the functions of the sheriff judicial. Ownership is a matter of fact, and the officer is supposed capable of ascertaining who is the owner of goods, just as any one may learn who is proprietor of a particular shop, or member of a specified corporation or partnership, or alderman of a city, etc." * * * * "If the sheriff is commanded to levy upon the goods of a named person, the fact of his obedience is determined by ascertaining whether or not he has done so; if a magistrate is required to decide justly the controversy between two named persons, or if

Noble v. Himeo.

the assessor is required to value in just proportion the property of two named persons, no one can know whether or not the requirement has been obeyed unless he can look into the officer's mind and, by thus ascertaining what was his real judgment, determine whether he has actually obeyed it in giving decision or making the assessment. The difference is, that the sheriff is to obey an exact command, but the judicial officer is to follow his judgment. Even when the sheriff is embarrassed by the fact that the name of the defendant in the writ is the same with that of others in the neighborhood, he must at his peril ascertain who the real defendant is, and make service upon him." This we regard as a correct statement of the law. The officer is to levy upon and sell the goods of the execution debtor, not the goods of some one else. The fact that he has an execution against the property of A, will be no justification if he levies upon and sells the property of B.

In the case at bar the testimony shows that the constable was informed that the goods in question were not the property of Snow; yet he seems to have made no inquiry or effort to ascertain whether Snow was in fact the owner, or not. The instruction in question, while not as explicit as could be desired, is fully justified by the evidence, and is not prejudicial to Noble.

Second. It is claimed that the court erred in refusing to give the first instruction asked by Noble, which is as follows: "If the jury find from the evidence, that the property in question, or any part thereof, was in the possession of Lorenzo Snow, at the time the levy was made by George Noble, and further find, that the same property was not claimed by any person to belong to the plaintiffs in this action, at the time of the levy or before the sale, and that such claim was not made to the defendant, George Noble, then in such case the jury should find for the defendants." This instruction entire-

ly ignores the actual ownership of the property and makes notice to the officer, and a claim of the property, the criterion, by which his liability is to be determined for levying upon, and selling property, not belonging to the judgment debtor. The instruction was properly refused.

Third. The objection, that the verdict is not sustained by the evidence, is not well taken. The jury from the testimony would have been justified in returning no other verdict than for the plaintiffs in the court below.

Fourth. Objection is made to the bond of the constable as being unauthorized by law. This question was before the court in the case of *Williams v. Golden*, 10 Neb., 432, and it was held, that a constable's bond voluntarily given, and with a reasonable sum fixed as penalty therein, was binding on the sureties, although there was no law fixing any amount as penalty. The law requires a constable to give a bond, and the county commissioners, by fixing the amount of the penalty of the same, merely limit the liability of the sureties to the sum designated. This limitation is not necessary to make the bond valid, as without such limitation a surety would be liable for the full amount of the injury sustained. The judgment is clearly right and is affirmed.

JUDGMENT AFFIRMED.

JAMES MORTENSEN, COUNTY TREASURER OF CUMING COUNTY,
PLAINTIFF IN ERROR, v. THE WEST POINT MANUFACTURING
CO., DEFENDANT IN ERROR.

12 197
59 428

1. **Taxes:** ACTION BY COUNTY TREASURER. A county treasurer, when authorized and directed by the county commissioners to collect personalty taxes by suit, may maintain an action in his own name, in the county in which he holds his office, to recover the same.

2. **Constitutional Law.** Section 17 of the "act to provide a system of revenue," approved February 15th, 1869, providing for the assessment of stock of corporations, is not in conflict with section 1, Art. IX., of the constitution.

ERROR to the district court for Cuming county. Heard below before BARNES, J., on demurrer to petition. Demurrer sustained and action dismissed.

Uriah Bruner, for plaintiff in error.

1. The action was rightfully brought in name of treasurer. Gen. Stat., 912, Sec. 37. Laws 1879, 311, Sec. 89. In the collection of these taxes under the warrant issued to him he has assumed an express trust, and as trustee of such trust may maintain the action. Civil code, Sec. 30. *Regents v. McConnell*, 5 Neb., 423.

2. Sec. 17, Gen. Stat., 902, requires that stock only of defendant shall be assessed, and all other property omitted. If this is good law plaintiff cannot recover. Plaintiff, however, claims that it is unconstitutional, on the ground of inequality and want of uniformity. *Cooley Const. Lim.*, 622—625. *Woodbridge v. Detroit*, 8 Mich., 301. *Knowlton v. Supervisors*, 9 Wis., 410.

J. C. Crawford, for defendant in error.

MAXWELL, CH. J.

This is an action by the treasurer of Cuming county, against the defendant, to recover for the personal taxes assessed against it, for the years 1876, 1877 and 1878. A demurrer to the petition was sustained in the court below and the action dismissed.

But two of the questions presented by the record will be considered.

First. Can a county treasurer maintain an action in his own name to recover personalty taxes? *Second.* Does the petition state a cause of action?

First. Section 89 of the revenue law of 1879, provides

that: "No demand for taxes shall be necessary, but it shall be the duty of every person subject to taxation under the laws of this state to attend at the treasurer's office, at the county seat, and pay his taxes; and if any person neglect so to attend and pay his personal taxes until the first day of November next after such taxes become delinquent, the treasurer is directed to levy and collect the same, together with the costs of collection, by distress and sale of personal property belonging to such person, in the manner provided by law for the levy and sale on execution, and the treasurer shall be entitled to the same fees for his service as are allowed by law to sheriffs for selling property under execution. *Provided*, That in case no personal property of the delinquent can be found, it shall be the duty of the treasurer, when directed so to do by order of the board of county commissioners of his county, to commence suit by civil action in the district court of said county, in the same manner as other civil actions are commenced, and prosecute the same to judgment and collection by execution, attachment, or garnishment, as the case may require, and that no property whatever shall be exempt from levy and sale under process issued on the judgment obtained in such action; and in case judgment be recovered, costs shall follow the judgment without regard to the amount of said judgment; *Provided further*, that in case any person having personal property assessed and upon which the taxes are unpaid shall, in the opinion of the treasurer, be about to remove out of the county, or in any other manner seek to put his personal property out of the reach of the treasurer, it shall be the duty of the treasurer to collect such taxes by distress, or by attachment, as the case may require, at any time after the tax duplicate has been placed in his hands. In case any person owing taxes remove, the treasurer shall, among other steps to collect such tax, forward, when necessary, such tax claim to the treasurer or tax

collector at the adopted residence, or place of abode of such tax debtor, and such taxes shall be collected at the latter place as other personal taxes, by distress or civil action, as the case may require, and returned to the proper county, less such charges for collection as are hereinbefore provided. And such treasurer or tax collector to whom such tax claim shall be so forwarded is hereby authorized to commence and prosecute to judgment such civil action as may be necessary, in the district court of such county, in the name of the board of county commissioners of the county from which such tax claim shall be forwarded, immediately upon receipt thereof by him, upon which judgment without regard to the amount thereof, the plaintiff shall recover costs, and such judgment shall have the same effect as hereinbefore provided, when suit is brought in the county where such tax is levied." Comp. Stat., 415.

It is alleged in the petition that "on the 24th day of February, 1880, the board of county commissioners of said county directed said James Mortensen, treasurer of said county of Cuming, as such treasurer, to commence suit," etc. This allegation is admitted by the demurrer, and is sufficient authority to the treasurer to commence an action. Where the action is commenced in the county in which the treasurer holds his office, he is authorized to commence the same in his own name; but if the action is commenced in another county by a party to whom the claim is sent, then the action must be brought in the name of the county commissioners of the county to which the taxes are due, the authority of the treasurer to bring an action being restricted to his own county; but the action being brought in Cuming county, was properly brought in the name of the treasurer.

Second. The property assessed in this case was such property as is represented by the stock of the corporation, which stock was regularly assessed, and the attorney for

the plaintiff admits that if section 17 of "The act to provide a system of revenue," approved February 15th, 1869, is constitutional, the petition states no cause of action. The section referred to, after providing the mode of assessment of railroad, telegraph, ferry and bridge companies, provides that: "The stock of all other corporations, or joint stock companies, not in this section otherwise provided for, existing under any law of this state, and doing business therein, whether such stock is held by resident or non-resident owners, shall be assessed, and taxed the same as all other taxable property in the precinct where said company may have its principal place of business; and in assessing the value of such stock, the actual value in cash of all the property that is represented shall be considered, and no deduction shall be made in such valuation by reason of debts owing by said corporation, unless, as in other cases, such deductions be made from the item of money and credits listed by said corporation. Any real estate belonging to or represented by the capital stock, duly listed and returned, of any corporation, or joint-stock company, shall be omitted by the assessor from the return of taxable lands, or town lots, which he is required by law to make, *except in case all the property belonging to any corporation be real estate*, in which case the capital stock of such corporation, or company, shall be omitted from the list." It is claimed that this provision is in conflict with the provisions of section 1, Art. IX., of the constitution, which is as follows: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct, and it shall have the power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, inn-

keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates."

The petition fails to state in what the discrimination complained of consists, and it is unnecessary to enter into a discussion of that question. We fail to perceive wherein the provision of the revenue law, above quoted, is in conflict with the constitution. This being the case, there is no cause of action set forth in the petition, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

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18	86
18	332
24	102

A. L. McPHERSON, PLAINTIFF IN ERROR, v. THE FIRST NATIONAL BANK OF BEATRICE, DEFENDANT IN ERROR.

1. **Summons in county court.** It is sufficient in a summons issued by a county judge, to describe the plaintiff's cause of action in general terms. Summons held sufficient.
2. ——— : **MOTION TO QUASH : JUDGMENT.** Where a defendant filed a motion to quash a summons, which was overruled, and he refused to appear further in the action, *held*, That judgment against him without showing an entry of a default, would not be disturbed.

ERROR to the district court for Gage county. Tried below, before WEAVER, J., on a petition in error to the county court.

W. H. Ashby, for plaintiff in error, cited *Crowell v. Galloway*, 3 Neb., 215. *Lyman v. Milton*, 44 Cal., 630. *Sedgwick Statutory and Const. Law*, 275. *Wyatt v. Wyman*, 11 Leigh, 585.

Colby & Hazlett, for defendant in error.

MAXWELL, CH. J.

McPherson v. First National Bank.

On the 26th day of August, 1880, the First National Bank of Beatrice commenced an action against A. L. McPherson, in the county court of Gage county, to recover the sum of \$21.50 and interest. Summons was duly issued on the 26th, served on the 27th, which was returnable on the 31st of that month at 10 o'clock A. M. On the return day of the summons McPherson appeared specially by an attorney and moved to quash the summons. *First*, because it did not sufficiently describe the plaintiff's cause of action. *Second*, because it did not notify the defendant to appear before the officer issuing the same at his office in Gage county. The motion was overruled, to which McPherson excepted, and he refusing to appear further in the action, judgment was rendered against him for the sum of \$21.60 and costs. The case was taken on error to the district court, where the judgment was affirmed. The cause is brought into this court by petition in error.

The following is a copy of the summons complained of:

"STATE OF NEBRASKA, }
COUNTY OF GAGE, } ss.

The State of Nebraska: To the sheriff or any constable of said county, Greeting: You are hereby commanded to summon A. L. McPherson, defendant, to be and appear before the county court, at Beatrice, in said county, on the 31st day of August, 1880, at 10 o'clock A. M., to answer to the bill of particulars of the First National Bank of Beatrice, Nebraska, plaintiffs, wherein they claim of said defendant the sum of \$21.50 with interest at 10 per cent. from August 12th, 1880, as due upon one promissory note, and return then this writ.

This 26th day of August, A. D. 1880.

J. E. COBBEY,

Judge of County Court."

Sec. 910 of the code provides that: "The style of the

summons shall be: "The state of Nebraska, — county," it shall be dated the day it is issued, and signed by the justice issuing the same; be directed to the constable or sheriff of the proper county, (except in case a person be deputed to serve it, in which case it shall be directed to such person); must contain the name of the defendant or defendants, if known, and if unknown, give a description of him or them, and command the officer, or person serving the same, to summon the defendant or defendants to appear before such justice, at his office, in — county, at a time specified therein; and must describe the plaintiff's cause of action in such general terms as to apprise the defendant of the nature of the claim against him."

The plaintiff's cause of action is to be described in such general terms as to apprise the defendant of the nature of the claim against him. At common law, actions were designated as in *assumpsit*, *debt*, etc. The provision above quoted was doubtless intended as a substitute for the common law form. All that is necessary is to designate in a very general way the plaintiff's cause of action. In the summons the cause of action is described as being upon one promissory note, and this is sufficient.

The second objection is not well taken. The defendant was required to appear before the county court, at Beatrice, on the 31st day of August, 1890, at 10 o'clock A. M., etc. This was a sufficient designation of the time and place where he was required to appear, and he seems to have had no difficulty in that respect. The motion to quash the summons, for the reasons stated, was properly overruled. While the summons was sufficient in form to give the court jurisdiction, it, in some respects, does not conform to the statute. The style of summons is required to be: "The state of Nebraska, — county." This is sufficient to show the venue and also comply with the constitutional provision, that all writs shall run in the

Deck v. Smith.

name of the state. The date when the summons is to be returned should be clear and unambiguous; thus: "you will make due return of this writ on or before the—— day of——," etc.

It is objected, that no default was entered against McPherson before judgment was rendered against him. The record shows the following facts: "August 31st, 1880, defendant makes special appearance, objecting to jurisdiction by motion. Motion overruled. Defendant excepts. Defendant refuses to further proceed or appear in the case, and stands upon his motion. Wherefore, the court being fully advised in the premises, finds, that there is justly due from said defendant to plaintiff, the sum of \$21.60," etc.

The record shows that, upon his motion being overruled, McPherson refused to appear further in the case. It was unnecessary, therefore, to enter a default against him. If he wished to have the judgment set aside and be permitted to defend, he still had ten days in which to make the motion. Justice courts are created for the purpose of trying minor causes, with as little delay and expense to the parties as is consistent with the proper administration of justice. It is the policy of the law to require trials to be had on the merits, and the proceedings of such courts in all matters, except as to the jurisdiction, will be viewed with great liberality. It is very clear that justice has been done in the premises, and the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

PHILIP DECK, PLAINTIFF IN ERROR, v. EMILE SMITH, DEFENDANT IN ERROR.

12	206
18	199
19	205
27	619

1. Bill of Exceptions. It is the duty of the adverse party, upon receiving a bill of exceptions, to propose amendments thereto,

Deck v. Smith.

and return such bill with his proposed amendments within the time limited by statute to the party proposing the bill.

2. ——. A judgment was rendered in February, 1880. Court adjourned *sine die* on the 21st day of March thereafter, forty days having been given to reduce the exceptions to writing. The bill was prepared and submitted to the attorney for the adverse party, on the 24th day of April, who permitted it to remain in his office until the 7th day of June, but proposed no material amendment thereto. On the 8th day of June the bill was presented to the judge, who afterwards signed the same. *Held*, That the bill would not be quashed on the motion of the attorney for the adverse party, because not signed within the time limited by statute.

MOTION to quash bill of exceptions.

M. H. Sessions, for the motion.

L. C. Burr, *contra*.

MAXWELL, CH. J.

This is a motion filed on behalf of the defendant in error to quash the bill of exceptions. The plaintiff was granted forty days from the rising of the court to prepare a bill of exceptions. Court adjourned *sine die* on the 21st day of March, 1880. On the 24th of April of that year, the attorney for the plaintiff prepared the bill and submitted it to the attorney for the defendant. This bill was retained in the office of the defendant's attorney until the 7th day of June of that year. The reason assigned for the delay by the attorney of the defendant in his affidavit is "that said bill of exceptions was laying in my office during the whole time, and it entirely escaped my memory that it was there," etc. No material amendments to the bill were suggested by him. On the 8th day of June, 1880, the attorney for the plaintiff presented the bill to the judge for his signature, and the bill was signed without date, but the certificate recites the cause of delay in settling the bill. Afterwards, on the 23rd of December, 1880, the judge erased his name from the

certificate, while the bill was on file in the clerk's office, and attached another certificate, duly signed, but stating that the bill was presented to him for his signature in December, 1880. The defendant's motion is to quash the bill, because not signed within the time required by law.

Sec. 311 of the code provides that: "When the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing within fifteen (15) days, or in such time as the court may direct, not exceeding forty (40) days from the adjournment of the court *sine die*, and submit the same to the adverse party or his attorney of record for examination and amendment, if desired. Such draft must contain all the exceptions taken upon which the party relies. Within ten days after such submission the adverse party may propose amendments thereto, and *shall return said bill with his proposed amendments to the other party*, or his attorney of record."

It is the duty of the adverse party to propose amendments if the bill is incorrect, and return the bill with the proposed amendments to the party excepting or his attorney. See *First National Bank v. Bartlett*, 8 Neb., 319. He cannot close his office, or place the bill where it will be overlooked or forgotten, and then plead his own neglect to deprive the party excepting of his rights. Matters of mere form in settling bills of exceptions are construed very liberally to save the rights of parties. The judge, having signed the bill, had no authority to erase his name therefrom after the same was filed. But as the only material objection to the bill is the delay in signing the same, and as such delay was the fault of the attorney for the defendant, the motion to quash is overruled.

MOTION OVERRULED.

THE FIRST NATIONAL BANK OF BARNESVILLE, OHIO, PLAINTIFF IN ERROR, v. A. D. YOCUM, DEFENDANT IN ERROR.

Motion for rehearing. Leave to file a motion for a rehearing (more than thirty days from time of filing opinion having elapsed), denied.

APPLICATION for leave to file a motion for a rehearing, in the case reported 11 Neb., 328.

Hewitt & Yocum, for the application.

MAXWELL, CH. J.

This is an application on behalf of the defendant for leave to file a motion for a rehearing, as more than thirty days have elapsed since the filing of the opinion. The application is supported by the affidavit of the defendant, wherein he states that he "was never notified of the action of the supreme court in its finding and reversal of said cause, so that he could file a motion for a rehearing within the time required by the rule," etc.

Rule XVI provides that: "A motion for a rehearing may be filed, as of course, at any time within thirty days from the filing of the opinion of the court in the case," etc. The object of the rule is, to allow either party, in a case, to call the attention of the court to any matter involved therein, which may be deemed important. In other words, the court is desirous of avoiding errors, and therefore invites either party, when dissatisfied with the opinion, to point out errors therein. But a party who seeks to file a motion out of time, upon the ground that he had no notice of the filing of the opinion, must state facts. He must state the time when he first received notice, and not in the form of a mere conclusion. It must appear too, that the failure to receive notice was not his fault. In both these particulars the affidavit in question is fatally defective.

As a further consideration for denying the application we are convinced that our former opinion filed in this case is correct. The action was brought upon a promissory note, dated January 24th, 1872, made by the defendant herein, to one "P. Clark, or bearer," and due and payable six months after date, which note it is alleged in the petition, was on the 5th day of February, 1872, for a valuable consideration transferred to the plaintiff. To the petition the defendant filed an answer, wherein he "admits that he executed the said promissory note described in said plaintiff's petition, but denies that he owes said plaintiff any sum of money whatever therein, for the reason that said promissory note was executed and delivered by said plaintiff to the said P. Clark therein named, without any consideration whatever having been paid by the said P. Clark." It is also alleged that the plaintiff had notice of the fact before it became the holder of the note. The second count of the answer states in substance that the note was given in payment of worthless cloth, and that he was induced to purchase the same by false representations. The third count is substantially the same as the second. The fourth count alleges, that the plaintiff is not the legal owner or holder of said note. The answer may be summed up in these words: that the cloth for which the note was given was of no value; that the defendant was induced to purchase said cloth by false representations; and that the plaintiff had notice of these facts before purchasing the note. These being the issues, the instruction referred to in the opinion of the court was unauthorized, and in any view of the case must have misled the jury. A new trial will obviate this objection. The application must therefore be denied.

APPLICATION DENIED.

12	210
13	267
14	187
12	210
32	119
12	210
42	409
19	210
58	432

PETER SWANSEN, PLAINTIFF IN ERROR, V. GURILLA SWANSEN,
DEFENDANT IN ERROR.

1. Practice in Supreme Court: DIVORCE: ERROR. A decree of divorce and alimony was rendered November 18th, 1890, and a transcript of the proceedings and a petition in error filed in the supreme court July 27th, 1881, no motion for a new trial having been filed in the court below. Held (more than six months having elapsed since the rendition of the decree,) that none of the errors assigned in the proceedings of the court could be considered. In such case, the sole question presented is the sufficiency of the petition to sustain the judgment.
2. ———: APPEAL. An appeal in equity causes will lie to the supreme court from a final order or judgment of the district court, in which case no motion for a new trial is necessary. But if an equity cause is taken on error to the supreme court, the same procedure must be had as in an action at law.
3. Alimony. A decree, declaring alimony a lien upon real estate, reversed.

ERROR to the district court for Dodge county. Tried below, before Post, J. The opinion states the case.

William Marshall, for plaintiff in error.

W. H. Munger, for defendant in error.

MAXWELL, CH. J.

On the 18th day of November, 1880, the defendant in error obtained a decree of divorce from the plaintiff, in the district court of Dodge county. The court also awarded \$250.00 to said defendant as alimony, and decreed that the same be a lien upon the real estate of the plaintiff. On the 27th day of July, 1881, a transcript of the proceedings in the district court and a petition in error were filed in this court. The attorney for the defendant now moves to strike out of the petition in error the 2d, 3d, 4th and 5th assignments, upon the ground that the errors assigned therein cannot be considered, no motion for a new trial having been made in the

court below. The record shows that no motion for a new trial was made, and none of the alleged errors brought to the attention of the trial court. This was necessary, in order to have a review of the proceedings of the court below by petition in error. The motion for a new trial, however, is to correct error in the proceedings, and it is not necessary to raise an objection to a vital defect in a petition, like a failure to state a cause of action. This may be taken advantage of at any time, no motion for that purpose being necessary. In our dual system of practice, an appeal in actions in equity may be taken to the supreme court from a final decree in the district court, at any time within six months from the rendition of the decree, and no motion for a new trial is necessary, while in actions at law and equity cases, taken on error to the supreme court, a motion for a new trial containing the errors complained of, must have been filed and acted upon by the trial court. *Cutler v. Roberts*, 7 Neb., 9; *Midland R. R. Co. v. McCartney*, 1 Id., 406; *Mills v. Miller*, 2 Id., 817; *Wells, et al., v. Preston*, 3 Id., 446; *Cropsy v. Wiggenghorn*, Id., 117; *Singleton v. Boyle*, 4 Id., 11. The petition in error is to be filed within one year after the date of rendition of the final judgment. It is desirable, perhaps, that the procedure should be the same in law and equity cases. And certainly no discrimination should be made in the time of filing transcripts in this court. But this is a consideration to be addressed to the legislature. As there was no motion for a new trial filed in the court below, the motion to strike out must be sustained. The only question therefore to be considered, is the sufficiency of the petition to sustain the judgment.

In our opinion the petition is sufficient to sustain the decree of divorce, but not sufficient to sustain a decree making the alimony a lien upon the real estate of the plaintiff in error. The allegations as to the ownership

Swansen v. Swansen.

of property are as follows: "That said defendant is the owner of personal property and money of the value of fifteen hundred dollars, and is the owner of one hundred and twenty acres of land, situated in Dodge county, of the value of fifteen hundred dollars," etc.

Section 22 of the chapter in relation to divorce and alimony, (Comp. Stat., Chap. 35.) provides that: "Upon every divorce from the bonds of matrimony, for any cause excepting that of adultery, committed by the wife, and also upon every divorce from bed and board from any cause, if the estate and effects restored or awarded to the wife shall be insufficient for the suitable support and maintenance of herself and such children of the marriage as shall be committed to her care and custody, the court may further decree to her such part of the personal estate of the husband, and such alimony out of his estate as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case."

Section 26 provides that: "In all cases where alimony or other allowance shall be decreed for the wife and children, the court may require sufficient security to be given by the husband for the payment thereof, according to the terms of the decree; and upon the neglect or refusal of the husband to give such security, or upon his failure to pay such alimony and allowance, the court may sequester his personal estate, and the rents and profits of his real estate, and may appoint a receiver thereof, and cause such personal estate, and the rents and profits of such real estate, to be applied to the payment thereof."

This procedure should have been followed in this case, and the decree, so far as it makes the alimony a lien upon the real estate, is reversed. Undoubtedly the court has authority to enforce its decrees as to alimony, but the extent to which it may go in the enforcement of

such decree is not now before the court. The decree of the court below will be modified in conformity with this opinion.

JUDGMENT ACCORDINGLY.

WILLIAM P. PHILLIPS, PLAINTIFF IN ERROR, v. BENJAMIN F. JONES, DEFENDANT IN ERROR.

False representations. In an action for false representations as to the quality of certain Kansas lands, exchanged for property in the city of Lincoln, at \$1,500.00, it appearing that the lands were nearly worthless, a judgment for \$500.00 damages was sustained.

ERROR to the district court for Lancaster county. Tried below before POUND, J. The facts appear in the opinion.

W. J. Lamb, for plaintiff in error.

A. C. Ricketts, for defendant in error.

MAXWELL, CH. J.

The defendant herein brought an action against the plaintiff, in the district court of Lancaster county, to recover from him the sum of \$1,500.00, the cause of action being that he, (Jones), had sold to Phillips a house and lot in the city of Lincoln, for the sum of \$3,000.00, and received in payment \$1,500.00 in cash and 240 acres of Kansas lands, valued at \$1,500.00. It is alleged in the petition that Phillips represented to Jones "that said land was good land; that it was a choice piece of farming land; that he had been offered five dollars per acre for it, but had refused it; that he could then get five dollars per acre for it and would not accept it, but that he held it at six and twenty-five hundredths dollars per acre." It is also stated that Jones had never seen the lands, and that he confided wholly in Phillips' representations, and that

12	213
25	85
12	213
46	821
19	213
47	360
12	213
54	793

said representations were false and untrue, as Phillips well knew, and that said land was stony and worthless." To the petition Phillips filed an answer in which he alleges, in substance, that there was an exchange of property between the plaintiff and defendant; that he gave Jones and his agents a description of the Kansas lands some thirty days prior to the exchange, and expressly told them that he had never seen the land, and that he was to inform himself in regard to the quality; that he did not tell him that said lands were choice farming lands, but that they were of average quality in that locality, and that he believed his statements to be true.

On the trial of the cause a verdict was rendered in favor of Jones, for the sum of \$500.00, upon which judgment was rendered. Phillips brings the cause into this court by petition in error.

A number of technical objections are made to the judgment, which we do not deem it necessary to notice. The land traded by Phillips to Jones is shown by all the testimony to be nearly worthless,—worth fifty cents per acre. We do not care to comment at length upon the testimony. Mr. Phillips admits on cross examination, that he stated to the agent of Jones, while the negotiations were pending, that he made the following representations as to the land: Q. "Did you not tell Mr. Loomis (the agent), that that was a good piece of land?" A. "A good piece of land, averaging with the land in that county." It is very clear from the testimony that the land in controversy is not of average quality with lands in the county in which it is situated. His own testimony, therefore, is sufficient to sustain the verdict, and all the testimony upon that point tends to show that he made representations that this was good land, or choice farming land.

It is a very old head of equity, says chancellor Kent, adopting the language of Lord Eldon, that if a representation be made to another person, going to deal in a mat-

ter of interest upon the faith of that representation, the former shall make the representation good, if he knows that representation to be false. *Bacon v. Brenson*, 7 Johns Ch., 201. *Evans v. Bicknell*, 6 Ves., 182. And if a party, without knowing whether his statements are true or not, makes an assertion as to any particular matter upon which the other party has relied, the party defrauded in a proper case will be entitled to relief. *Smith v. Richards*, 13 Pet., 38. *Trumbull v. Gadsden*, 2 Strobbart's Eq. South Car., R. 14. *McFerran v. Taylor*, 3 Cranch, 281.

As was said in the case of *McFerran v. Taylor*: "He who sells property on a description given by himself, is bound in equity to make that description good, and if it be untrue in a material point, although the variance be occasioned by mistake, he must remain liable for that variance." It is evident that substantial justice has been done in the premises and the judgment will be affirmed.

JUDGMENT AFFIRMED.

RAYMOND BROTHERS AND CYRUS LANGWORTHY, PLAINTIFFS
IN ERROR, V. GREEN & CO., DEFENDANTS IN ERROR.

1. Action on attachment undertaking: SET-OFF. In an action upon an undertaking for an attachment, held, That a claim due from the obligees in favor of the principals could be set-off although the damages were unliquidated. *Boyer v. Clark*, 3 Neb., 167, modified.
2. —: —. In an action upon an undertaking against a principal and surety, a demand due from the plaintiff to the principal may be set off against the claim of the plaintiff.
3. —: DAMAGES. In an action upon an undertaking for an attachment, the reasonable value of an attorney's services, who procured the dissolution of the attachment, is a proper item of damage.

12	215
44	908
12	215
146	577
13	215
48	154
12	215
60	514

Raymond Bros. v. Green & Co.

ERROR to the district court for York county. Tried below before Post, J. The opinion states the case.

Harwood & Ames, for plaintiffs in error.

1. The set-off should have been allowed. Code, sec. 103. *Pomeroy on Remedies*, 752, and note. *Parsons v. Nash*, 8 How. Pr., 454. *Stevens v. Able*, 15 Kan., 584.

2. It is admitted on the record that no sum has ever been paid by the plaintiffs as attorney's fees for services in procuring a dissolution of the attachment, and in an action on the bond no recovery can be had for services of counsel, unless payment has been actually made. It is apparent from the circumstances of this cause that the action is mainly a speculative one in the interests of attorneys, and such litigation does not deserve, and will not receive, encouragement from the courts. *Hughes v. Brooks*, 36 Tex., 379. *Plumb v. Woodmansee*, 34 Iowa, 116. *Oelrichs v. Spain*, 15 Wal., 211. *Heath v. Lent*, 1 Cal., 410. *Cowdore v. Martin*, 17 Mo., 41.

3. In an action upon an attachment bond nothing can be recovered in compensation for damage resulting from the action or expenses incurred in its defense. High on Injunctions, 557. *Plumb v. Woodmansee*, 34 Iowa, 116. Drake on Attachments, 176. *Behrens v. McKenzie*, 23 Iowa, 333. *Langworthy v. McKelvey*, 25 Iowa, 48. Sedgwick on Damages, 311 *et seq.* *Gregory v. Hartley*, 6 Neb., 356. *Gilbert v. Winan*, 1 N. Y., 550.

France & Sedgwick, for defendants in error.

1. An action on an attachment bond is not an action arising out of contract within the meaning of the statutes. Gen. Statutes, p. 541, sec. 104. *Boyer v. Clark & McCandless*, 3 Neb., 168, and cases cited. *Osborne v. Etheridge*, 13 Wend., 339.

2. As to attorney fees. *Bonesteel v. Bonesteel*, 30

Wis., 511. High on Injunctions, 562. *Ah Thae v. Quan*, 8 Cal., 216.

MAXWELL, CH. J.

This action was brought by Green & Co., in the district court of York county, upon an undertaking in attachment, of which the following is a copy :

"Know all men by these presents, that we, Raymond Brothers, as principal, and Cyrus Langworthy, as surety, are held and firmly bound unto Green & Company, in the sum of five hundred and fifty dollars (\$550.00), upon conditions following: Whereas the said Raymond Brothers is about suing out of the office of the county court judge, in and for said county, a writ of attachment against the property of said Green & Company, defendants, for the sum of two hundred and sixty-five dollars and thirty-two cents (\$265.32), in a certain action against the said Green; Now if the said Raymond Brothers shall pay all damages which the said Green & Company may sustain, by reason of the unlawful suing out of said writ, then this obligation to be void, otherwise to remain in force.

Witness our hands, this 2nd day of March, A. D. 1878,

RAYMOND BROTHERS, *Principal*.

CYRUS LANGWORTHY, *Surety*."

Raymond Bros, in their answer to the petition, *First*. Deny certain facts stated therein. *Second*. Set up as a set-off certain drafts drawn by them on Green & Co. and accepted, upon which there is due the sum of \$265.52 and interest. Green & Company demurred to the set-off and the demurrer was sustained.

This case seems to have grown out of that of *Green & Co. v. Raymond Brothers*, 9 Neb., 295.

The first question to be determined is, was the set-off of Raymond Brothers a proper matter of set-off.

In the case of *Boyer v. Clark & McCandless*, 3 Neb., 161, this court held that a claim for unliquidated damages, the recovery of which is still uncertain, cannot be the subject of set-off.

Section 100 of the code of civil procedure provides that: "The defendant may set forth in his answer as many grounds of defense, counter-claim and set-off as he may have. Each must be separately stated and numbered, and they must refer in an intelligible manner to the cause of action, which they are intended to answer."

Section 101 provides that: "The counter-claim mentioned in the last section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction, set forth in the petition, as the foundation of the plaintiff's claim, or connected with the subject of the action."

Section 104 provides that: "A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of the court."

The term set-off is here preserved, and is distinguished from counter-claim.

The defense of set-off was unknown to the common law, it being purely the creature of statute, at least in courts having no equity jurisdiction. S. 13, Ch. 22, of 2 Geo. 2, made perpetual by 8 Geo. 2, C. 24, S. 4, provides that: "Where there are mutual debts between the plaintiff and defendant, or, if either party sue or be sued, as executor or administrator, when there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case may require, so as at the time of his pleading the general issue, when any such debt of the plaintiff, his testator or intestate, is intended to be

inserted or given in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue."

The object of these statutes was to prevent cross actions between the same parties. *Isbay v. Bowlen*, 8 Exch., 852, 22 Eng., L. & E., 551; *Wallis v. Bastard*, 4 De. G. M. & G., 251, 31 Eng., L. & E., 175. The law of set-off, at the present time, may be said to consist of the rules and principles derived from adjudications upon the above statutes. A set-off is allowable in all cases of mutual debt—that is, in all claims in the nature of a debt.

In *Green v. Farmer*, 4 Burr., 2220—1, Lord Mansfield said: "Natural equity says, that cross-demands should compensate each other, by deducting the less sum from the greater, and that the difference is the only sum which can be justly due. But positive law, for the sake of the forms of proceeding and convenience of trial, has said, that each must sue and recover separately, in separate actions. It may give light to this case, and the authorities cited, if I trace the law relative to the doing complete justice in the same suit, or turning the defendant around to another suit, which, under various circumstances, may be of no avail. Where the nature of the employment, transaction, or dealings, necessarily constitutes an account, consisting of receipts and payments, debts and credits, it is certain, that only the balance can be the debt; and, by the proper forms of proceeding in courts of law or equity, the balance only can be recovered. After a judgment, or decree "to account," both parties are equally actors. Where there were mutual debts unconnected, the laws said, they should not set-off; but each must sue. And courts of equity followed the same rule, because it was the law; for, had they done other-

wise, they would have stopped the course of law in all cases where there was a mutual demand. The natural sense of mankind was first shocked at this in the case of bankrupts; and it was provided for by 4 Anne, Ch. 17, S. 11, and 5 Geo. 11, Ch. 30, S. 28. This clause must have, everywhere, the same construction and effect; whether the question arises upon a summary petition, or a formal bill, or an action at law. There can be but one right construction; and therefore, if courts differ, one must be wrong. Where there was no bankruptcy, the injustice of not setting-off (especially after the death of either party,) was so glaring, that parliament interposed by 2 Geo. 11, Ch. 22, and 8 Geo. 11, Ch. 24, S. 5."

It is the policy of our law to settle in one action, so far as may be, all claims arising upon contract between the same parties. And this, too, whether the damages are liquidated or not. In the case at bar the action is brought upon the undertaking—the contract of the plaintiff to pay whatever damages the defendant should sustain by the attachment, if it was wrongfully issued. In no event can the judgment on the undertaking exceed the penalty therein, while it may be very much less. In our opinion it is more in harmony with the letter and spirit of the code to allow a set-off to be pleaded in all actions founded upon contract. And that, too, whether the damages are liquidated or not. *Stevens v. Able*, 15 Kans., 584. *Read v. Jeffries*, 16 Id., 584. The doctrine of *Boyer v. Clark* is therefore modified to that extent. And the Raymond Brothers being the principals in the undertaking, and the claim being in their favor may be set-off. *Wagner v. Stocking*, 22 Ohio State, 297.

The value of the services of the attorneys employed by Green & Co., to procure a dissolution of the attachment, was a proper item of damages, and the fact that such services had not been paid for, would not prevent a recovery of the amount reasonably due. The judgment

of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

WILL B. DALE, PLAINTIFF IN ERROR, v. WILLIAM HUNNEMAN, DEFENDANT IN ERROR.

1. **Ejectment: PLEADING: EVIDENCE.** A plaintiff in ejectment must possess a legal estate, and be entitled to the possession of the premises sought to be recovered.

Under a general denial the defendant may prove an equity, which negatives the plaintiff's right to the possession.

2. ———: ———: **DEFENSE.** If a defendant in ejectment seek affirmative relief, such as to enforce a contract which does not give him the right to the possession, but does give him the right to demand a specific execution of the contract, upon which the right to continue in possession depends, he must plead the facts entitling him to such relief.

3. **Pleading: COUNTER-CLAIM.** A counter-claim is an independent cause of action, in which the defendant becomes an actor in respect to his claim.

ERROR to the district court for Platte county. Tried below, before Post, J. The opinion states the facts of the case.

George G. Bowman and Cornelius & Sullivan, for plaintiff in error, cited *Story's Equity*, Sec. 761. *Edwards v. Fry*, 9 Kan., 422. *Holcomb v. Dowell*, 15 Kan., 382. *Kirk v. Hamilton*, 102 U. S., 68. General denial was sufficient to admit evidence offered. 2 Nash. Pl. & Pr., 1209, 1210. *Wintermute v. Montgomery*, 11 Ohio State, 442. *Crary v. Goodman*, 12 N. Y., 266. *Richardson v. Steele*, 9 Neb., 483. Evidence, if received, would have shown title that would clearly have brought plaintiff in error within the occupying claimants act. *Lemert v. Barnee*, 18 Kan., 9.

12	221
30	196
12	221
85	165
36	227
13	221
44	785
12	221
43	682
12	221
52	598
53	158
12	221
59	632
13	221
60	402

Dale v. Hunneman.

Byron Millett and Marlow & Munger, for defendant in error.

1. Where the contract itself does not give the right of possession, but such right to possession depends upon the right to a specific performance of the contract, then the facts which entitle the party to such specific performance should be pleaded. *Dewey v. Hoag*, 15 Barb., 365. *Estrada v. Murphy*, 19 Cal., 248. *Blum v. Robertson*, 24 Cal., 128. *Bruck v. Tucker*, 42 Cal., 346. *McCauley v. Fulton*, 44 Cal., 355. *DuPont v. Davis*, 35 Wis., 631. Bliss on Code Pleading, Sec. 351 and note 4.

2. As to admissibility of evidence to establish rights under occupying claimants act, see *Buchanan v. Dorsey*, 11 Neb., 373.

MAXWELL, Ch. J.

This is an action of ejectment, the defense being a general denial. Judgment in the court below was rendered in favor of Hunneman, who had been by order of court substituted as plaintiff in lieu of Doddridge, the original plaintiff. The errors assigned will be considered in their order.

First. Objection is made to the admission of the deposition of W. B. Doddridge, upon the ground that it was taken in violation of an agreement, etc. The agreement was denied, and it is very clear that no advantage was taken of the plaintiff in taking the deposition, and it is proper evidence. There was therefore no error in its admission.

Second. It is urged that the court erred in excluding the testimony of the plaintiff, as to the value of lasting and valuable improvements erected by him on the premises in controversy. It appears from the testimony that the plaintiff took possession of the premises in the spring of 1874, under a verbal lease from W. B. Doddridge; that he remained in possession as such tenant until March, 1877,

at which time a proposition was made by Doddridge to Dale, offering to sell him the premises for the sum of \$1,000, payable in county warrants. This proposition seems to have been accepted, the warrants to be delivered on or before July 1st, 1877. None of the warrants have ever been delivered, nor has the plaintiff paid any sum whatever for said premises. Nor does he now offer to comply with said contract in any manner or form. This being the case, the mere fact that the plaintiff had made valuable improvements upon the premises constituted no defense to an action for the possession. If his case is within the provisions of the occupying claimants act, he may still apply for relief as to the value of such improvements.

Section 626 of the code provides that: "In an action for the recovery of real property, it shall be sufficient, if the plaintiff state in his petition that he has a legal estate therein, and is entitled to the possession thereof," etc.

Section 627 provides that: "It shall be sufficient in such action, if the defendant in his answer deny, generally, the title alleged in the petition, or that he withholds the possession, as the case may be; but if he deny the title of the plaintiff, possession of the defendant will be admitted."

The action of ejectment was originally devised to enable a tenant for years to recover the possession of the demised premises during the term, real actions at that time being confined to freehold estates. Blackstone says: "In order to maintain the action, the plaintiff must, in case of any defense, make out four points before the court, viz: title, lease, entry and ouster. *First*, He must show a good title in his lessor, which brings the matter of right entirely before the court; then that the lessor being seized or possessed by virtue of such title, did make him the lease for the present term; *Thirdly*, That he,

Dale v. Hunneman.

the lessee or plaintiff, did enter or take possession in consequence of such lease; and then, lastly, that the defendant ousted or ejected him." 3 Blacks. Com., 202. The form of the action was afterwards modified, so as to allow no question to be raised, except that of title and possession. And if the plaintiff was entitled to the possession, he could recover, whether the party in possession had ousted him or not. Under the code, to entitle the plaintiff to recover, he must possess a legal estate in the premises, and must state in his petition that he is entitled to the possession of the premises. Where the facts stated in the petition are denied, the plaintiff to be entitled to recover, must prove that he possesses a legal estate in the premises, and is entitled to the possession of the same. If the defendant possesses an equity which negatives the plaintiff's right of possession, such equity may be proved under a general denial, as it is a mere defense to the action. But if the defendant seek affirmative relief, such as to enforce a contract which does not give him the right of possession, but does give him a right to demand a specific execution of the contract by the plaintiff, upon which the right to continue in possession of the premises depends, he must plead the facts entitling him to such relief. And his answer must contain all the facts necessary to entitle him to such relief. In other words, he may set up in his answer the facts showing him to have an equitable right to a conveyance from the plaintiff, and if he prove himself equitably the owner, and entitled to the possession, he will not only defeat the action, but obtain affirmative relief. In all cases where affirmative relief is sought by the defendant, the facts entitling him thereto must be set up in the answer. See Bliss on Code Pleading, sections 349-351. *Dewey v. Hoag*, 15 Barb., 365. *Du Pont v. Davis*, 35 Wis., 631. *Estrada v. Murphy*, 19 Cal., 248. *Blum v. Robertson*, 24 Id., 128. *Bruck v. Tucker*, 42 Id., 346.

The reason is, a counter-claim is an independent cause of action, in which the defendant becomes an actor in respect to his claim, and it is required to be stated with the same distinctness and certainty as in a petition. The evidence as to the value of the improvements was inadmissible under the pleadings, and was properly excluded. The judgment of the district court is clearly right and is affirmed.

JUDGMENT AFFIRMED.

WILLIAM DIETRICHs, PLAINTIFF IN ERROR, v. THE LINCOLN & NORTHWESTERN RAILROAD COMPANY, DEFENDANT IN ERROR.

1. **Railroad: RIGHT OF WAY: DAMAGES: EVIDENCE.** The question on trial was the market value of two lots with a dwelling house and other improvements thereon, in the city of Columbus, Platte county, on the 30th day of March, 1880. *Held*, that testimony that on the 10th day of April, 1877, the said lots were bought by the said William Dietrichs, at administrator's sale, for seventy-five cents each, was erroneously admitted.
2. ———: **JUDGMENT: VERDICT.** In case of an appeal from the award of commissioners, appointed to assess the damages to land holders, caused by the taking of their lands for right of way, depot grounds, etc., it is the duty of the district court to render judgment on the verdict of the jury.
3. **Practice: ADMISSION OF ILLEGAL EVIDENCE: BILL OF EXCEPTIONS.** Where the exception is for the admission of illegal evidence on the trial, it is not necessary that the bill of exceptions contain more of the testimony than is necessary to explain the exception taken.

ERROR to the district court for Platte county. Tried below, before Post, J. The opinion states the case.

W. S. Geer, for plaintiff in error.

The plaintiff is entitled, not simply to such sum as the property would bring at forced sale, but to such a sum as the property is worth in the market, to persons gener-

12	225
15	870
12	225
39	825
12	225
44	697
12	225
51	729

Dietrichs v. L. & N. R. R. Co.

ally, if those desiring to purchase were found who were willing to pay a just and full value for his property. *Patterson v. Boom Co*, 3 Dill., 465. *Lawrence v. Boston*, 119 Mass., 126. *Somerville R. R. v. Doughty*, 22 N. J. L., 495. Thus, if the price realized at a forced sale is not the true criterion of the market value of the property, certainly it was incompetent to show the price paid at such a sale three years prior thereto. The basis on which all the evidence should have been admitted, should be the market value of the land when taken. *Stockton R. R. v. Galgiana*, 49 Cal., 139. Sales of land, the year previous, should be rejected as too remote in point of time to have any material bearing. *Green v. Fall River*, 113 Mass., 262. We do not claim that in no case can the price paid be given in evidence, but before it can be said to be competent or material, it must appear to have been made within a reasonably short space of time prior to the appropriation, so that the court may indulge in the presumption that between the date of such sale and the appropriation by the R. R. corporation, there would not, in the ordinary course of things, have been changes in the market value, and when the time is more than a year, there must be some positive proof showing no change in value to take the place of the presumption; and, without this proof as a foundation, the proof is foreign to the issue. *King v. Iowa Midland R. R.*, 34 Iowa, 458.

T. M. Marquett, (*Whitmoyer, Gerrard & Post*, with him,) for defendant in error.

1. It was proper to inquire what plaintiff had paid for the property, even though he purchased at an administrators sale. *Marsh v. Portsmouth, etc., R. R.*, 19 N. H., 372.

2. Bill of exceptions should contain all the evidence, not substance merely. *State v. Hamilton*, 32 Iowa, 572. *Ford v. Mitchell*, 21 Ind., 54.

3. The court erred in rendering judgment on the verdict. *Gear v. Dubuque & Sioux City R. R.*, 20 Iowa, 523.

4. We think the following propositions are sustained by authority: *First*. The only legal effect of an appraisal under our statute by commissioners, is to determine the price at which the condemning company may elect to purchase or appropriate property, in the exercise of the right of eminent domain. *Second*. In no case can judgment be rendered for the value of the property condemned until it has been reduced to possession. *Gear v. Dubuque R. R.*, 20 Iowa, 523. *Walther v. Warner*. 25 Mo., 277.

COBB, J.

This cause was brought to the court below on appeal by the Lincoln & Northwestern Railroad Company, from the award of commissioners, appointed on the application of said railroad company, to appraise the value of the two lots and the improvements thereon, of William Dietrichs, in the city of Columbus, Platte county, taken by said railroad company for the use of its railroad.

The issue tried by the district court was a plain and simple one. As agreed by stipulation, it was as follows: "What was the market value of lots one and two, in block seventy-five, in the city of Columbus, Platte county, including the buildings and fixtures thereon, on the 30th day of March, 1880?" On the trial the said William Dietrichs was sworn as a witness in his own behalf. Upon his direct examination he testified that he was acquainted with the market value of the property in question, on the 30th day of March, 1880, and that the market value thereof, at that time, was six hundred dollars. That the market value of the buildings, etc., at that time, was the sum of four hundred dollars, and the market value of the land was two hundred dollars. Thereupon his direct examination closed, and the counsel for

Dietrichs v. L. & N. R. R. Co.

the railroad company entered upon the cross-examination of the said William Dietrichs, and asked him the following questions, to-wit :

"Q. What did you pay for those lots?" The counsel for the said William Dietrichs objected to the question as incompetent and immaterial. The court overruled the objection, and decided that the testimony thereby sought to be introduced was competent and material, to fix the value of the property in question, which ruling was duly excepted to by the said William Dietrichs, whereupon the witness answered that he did not remember. Thereupon counsel for the said railroad company put the following question to the witness :

"Q. You bought them at the administrator's sale?"
Witness answered, "I think so."

Thereupon the counsel of the railroad company, to refresh the recollection of the witness, produced certain records, being court journal "A," of Platte county district court, at page 407, being record of administration sale, had and made on the 10th day of April, 1877, in the estate of Alexander B. Malcom, and read to said witness, in the presence of the court and jury, from said record, as follows :

"In the matter of the estate of Alexander B. Malcom, of Pottawottamie county, lot one, block 75, fractional, was sold to William Dietrichs for seventy-five cents. Lot two, block 75, sold to William Dietrichs for seventy-five cents." And then asked of the witness: "Now state what you paid for these lots?" The said William Dietrichs, by his counsel, objected to the question and the reference by counsel to the said record as incompetent and irrelevant. The court overruled the objection, which was duly excepted to, and thereupon witness answered in substance that the property in question was bought by him about that time at administrator's sale, and it was the only property ever pur-

chased by him in that block, and that when the record says that was the price paid, it must be so.

The court instructed the jury, among other things, as follows :

"In determining the value of the lots in question, you are at liberty to take into consideration the price paid by defendant for them, together with all other evidence given in the case."

The jury found the value of the property to be four hundred and fifty dollars, whereupon the court, after overruling the motion of the said William Dietrichs for a new trial, rendered judgment in his favor and against the said Lincoln & Northwestern Railroad Company, for the sum of four hundred and fifty dollars.

The court also adjudged that the court and clerk's fees be paid by the said William Dietrichs, and that each of said parties otherwise pay their own costs. In this court error is claimed by both parties.

No other species of property has so rapidly appreciated in value, within the past few years, as the more eligibly located lots in our larger railroad towns and cities. The price at which such lots were sold but a few years ago would not furnish the slightest evidence of their market value now.

The question before the supreme court of New Hampshire in *Marsh v. The Portsmouth & Concord Railroad Co.*, 19 N. H., 372, cited by counsel for the railroad company, was upon the admissibility of evidence as to the price at which a certain piece of property was sold at the administrator's sale, no question being raised as to the lapse of time since such sale.

The price at which the lots in question were sold, according to the record read by counsel for the railroad company, was ridiculously small in 1877, but had it been the fair value of the lots then, that fact would furnish no criterion of their value in 1880, and the admission in

evidence—substantially of the record, showing that the whole of the real property in question was once sold for a dollar and a half, was only calculated to belittle, and cast ridicule upon the claim of the claimant, and shed no intelligent light upon the question being tried.

Counsel for the Lincoln & Northwestern Railroad Company make the objection that the bill of exceptions does not even purport to contain all of the testimony given at the trial. This objection would doubtless be well taken, were this a case in which it is sought to reverse the judgment on the ground that the verdict is not sustained by the evidence.

Sec. 309 of the code reads as follows: "No particular form of exception is required. The exception must be stated with so much of the evidence as is necessary to explain it, and no more, and the whole as briefly as possible."

Under this provision of law we think the bill of exceptions in this case contains all that is necessary; the exception being to the admissibility of the testimony, and not to its sufficiency. Had none but legal testimony been admitted, there would certainly have been no error in the court telling the jury to consider all the testimony before them, so that the principal error consists in the admission of testimony improper to be considered.

It may not be amiss to say in this connection that, in the matter of settling bills of exceptions, there are some duties devolved upon the attorney representing the opposite side. In this case, the certificate of the judge is that "The foregoing is the substance of all the testimony offered or given by either party to this cause, on the subject as to the price paid for said lots by appellee, at the time of his purchase thereof." And the certificate of the attorneys of the Lincoln & Northwestern Railroad Company thereto is as follows: "We have examined the foregoing bill of exceptions, and find the same correct,"

etc. While we are not prepared to say that in all cases a certificate of opposite counsel like the above, would estop them from raising any point as to the sufficiency of the bill of exceptions, yet in a case like this, where the exception is confined to one point, and that a very narrow one, an objection should not be heard after counsel have agreed to its sufficiency, as above.

The Lincoln and Northwestern Railroad Company also present a petition in error in this case, and assign the following errors :

1st. The district court erred in rendering judgment on the finding of the jury in said action thereon.

2nd. The district court erred in taxing any of the costs in said court to defendant in error.

3d. The district court erred in not taxing the costs in said court to plaintiff in error.

Having examined the argument of counsel for the railroad company, as well as the authorities cited by him, we are unable to agree to his proposition, that the district court has no power to render a judgment upon the verdict of a jury upon an appeal, such as the one which we are now considering. And, while it is true that we do not find express authority to them to render such judgment in the chapter of the statutes, providing for the appraisal of damages, appeal, etc., yet, while they possess the power to render judgment on verdicts in judicial proceedings pending before them generally, we think, that had it been the intention of the legislature to make this class of cases an exception to that general rule, they would have expressed that intention in clearer terms than they have used in the statute bearing upon this subject. While it will not be contended that the rendition of a judgment against a railroad company for the value of an easement in real property will pass a title thereto before payment, yet, should it so happen that the railroad company never takes possession of such easement, the damage sustained

The State v. Gandy.

by the owner of the land, in the cloud upon his title, created by the condemnation proceedings, would be a sufficient legal consideration for the judgment.

The case at bar is not one merely of right of way; but here the railroad company proposes to take the entire two lots of Dietrichs, together with the improvements, the same being wanted for depot grounds. The case therefore furnishes a strong illustration of the hardship of the rule contended for by the railroad company, to-wit: that the owner of the land condemned, has no right to either the money or a judgment for it, until such time as it may suit the convenience of the railroad company, to take, or be about to immediately take possession, of the property. The condemnation proceedings are a matter of record, the statute has put no limitation upon the continuance of the same, during which it would be impossible for the owner to sell, and quite imprudent for him to improve the property, so that the jury having by their verdict fixed the amount to which he is entitled, it is but just that he should have judgment.

As, for error in the admission of improper testimony, there must be a new trial, it will not be deemed necessary to discuss the question of costs raised by either party.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

19	262
23	508
12	232
43	322

THE STATE OF NEBRASKA, EX REL. R. E. MOORE, v. L.
J. GANDY, COUNTY TREASURER OF YORK COUNTY.

Mandamus to compel payment of county warrants. A peremptory writ of mandamus was awarded against a county treas-

The State v. Gandy.

urer to compel the payment of certain county warrants, it appearing that there were sufficient funds in the treasury.

ORIGINAL application for mandamus.

Mason & Whedon, for relator.

No appearance for respondent.

MAXWELL, CH. J.

An alternative writ of mandamus was allowed in this case to which the respondent has made no return. The facts stated in the writ will therefore be taken as true.

The action is brought by the relator to compel the payment of certain county warrants owned by him. The writ, after describing the warrants, to whom issued, and their assignment to the relator, states in substance that the warrants were legally issued by the board of county commissioners of said county, upon accounts duly presented to and audited and allowed by said board when in session; that said warrants have been presented for payment, and payment thereof refused; that there are now sufficient funds in the treasury, after paying all other warrants issued on that fund prior to the issuing the same, to pay said warrants, etc.

These facts being conceded by the failure to answer the writ, it is the duty of the respondent to pay the warrants of the relator. It is probable the respondent desired the direction of the court as a protection. A peremptory writ will be awarded.

JUDGMENT ACCORDINGLY.

The State v. Wallichs.

THE STATE OF NEBRASKA, EX REL. GUY A. BROWN, v.
JOHN WALLICHS, AUDITOR OF PUBLIC ACCOUNTS.

Compiled Statutes: STATUTES CONSTRUED. In sec. 2 of the act providing for a compilation of the statutes of this state, approved February 26th, 1881, is a provision: "That the said Guy A. Brown" (the compiler), "shall furnish to the state of Nebraska, all copies of said statutes which may be required by the state at a price not to exceed two dollars and fifty cents per copy. * *

* * Said statutes to be published on or before July 1st, 1881." Afterwards, in the general appropriation act of the same session, in designating one of the objects provided for, this language was used, viz: "For the purchase of 3,500 copies of the statutes published under the provisions of an act to provide for the publication of a compilation of the statutes, the same to be distributed by the secretary of state to the same officers that the general statutes of 1873 were distributed, \$8,750.00." *Held*, that under these provisions the compiler was authorized to deliver at once, and demand payment for 3,500 copies, without reference to whether that many were required by the present necessities of the state or not; the last of the above provisions containing a legislative designation of the number to be furnished.

ORIGINAL application for mandamus.

O. P. Mason, for the relator.

C. J. Dilworth, Attorney General, for the respondent.
LAKE, J.

This is an application for a peremptory writ of mandamus to compel the respondent to draw his warrant upon the state treasurer for the sum of \$3,567.50, in favor of the relator, in payment of a balance claimed to be due to him from the state, for three thousand five hundred copies of compiled statutes furnished, as is alleged, in pursuance of legislative authority.

The only matter in controversy between the relator and respondent is the number of copies which the state is required to take and pay for. The ground taken by the latter is, that the state is liable for only such number as were necessary for supplying at the present time each

officer entitled thereto, at the public expense, with a copy.

In sec. 2 of the act providing for the publication of a compilation of the statutes of this state, approved February 26th, 1881, it is provided: "That the said Guy A. Brown shall furnish to the state of Nebraska all copies of said statutes which may be required by the state, at a price not to exceed two dollars and fifty cents per copy.

* * * * said statutes to be published on or before July 1st, 1881." Laws 1881, Chap. 80. Had this matter been left thus by the legislature, there would have been some strength in the respondent's position, that the state had assumed to take and pay for only the number actually needed at the time. But we find that, at the same session, the legislature, in the general appropriation act, made provision for meeting the expense of these statutes, using this language: "For the purchase of 3,500 copies of the statutes published under the provisions of an act to provide for a publication of a compilation of the statutes, the same to be distributed by the secretary of state to the same officers as the general statutes of 1873 were distributed, \$8,750.00." Laws 1881, p. 88.

In order to arrive at the true intent of the legislature respecting this matter, these two provisions must be taken together. In the first place, it is not reasonable to presume that the legislature could have intended to bind the relator to furnish only the exact number necessary for a present supply to the several officers entitled thereto. The state is growing; new counties and precincts are being organized; the number of officers, of the classes to which the laws are supplied, is constantly increasing, thus inducing a certainly continuing demand for additional copies. Nor would it be reasonable to infer that the intent was to require the compiler, after fully supplying the first demand, to stand ready to meet all future

calls, however uncertain, for such additional copies as the state might possibly need.

According to our understanding of the provisions above quoted, the only rational conclusion to be drawn from them is, that the legislature, exercising an undoubted inherent discretion, intended to supply the state with a definite number of copies, to be paid for at once upon delivery, and sufficient to meet not only the present, but also the future demands for a reasonable length of time. And the designation of this number was not left in doubt, to be determined by the uncertain discretion of the respondent, or any other state officer, but is expressed clearly enough, as we think, in the last of the above quotations. Whether this number were reasonable, or prodigal, under all the circumstances that should affect it, is not to be here considered. The legislature saw fit to designate the number "required by the state," and that designation is not subject to review. That is a matter with which neither the respondent nor this court has anything whatever to do. We are to administer the laws as enacted, in accordance with their evident design, leaving the responsibility with the legislature where it rightly belongs. The writ must be awarded as prayed, at the cost of the respondent.

WRIT ALLOWED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

12	287
13	390
19	354

JANUARY TERM, 1882.

PRESENT:

HON. GEORGE B. LAKE, CHIEF JUSTICE.
" AMASA COBB,
" SAMUEL MAXWELL, } JUDGES.

CHARLES S. KINNEY, PLAINTIFF IN ERROR, v. JOHN S.
DEGMAN, DEFENDANT IN ERROR.

1. **Replevin.** Action by D. to recover a quantity of corn, which he had grown upon a tract of land held by him as a homestead, under the law of the United States, and for which he held the usual receipt of the receiver of the local land office. K., the defendant in the action, was also a claimant of the land as a pre-emptor, but his claim had been rejected by the register and receiver, from whose decision he had taken an appeal, which was still pending before the Secretary of the Interior. Both were in possession, each of a portion of the land. When the corn was ripe, and during a temporary absence of D., and without his consent, K. harvested and claimed the corn as his own. Verdict and judgment for D. sustained.

Kinney v. Degman.

2. **Receiver's Receipt.** The usual duplicate receipt of the receiver of a land office is proof of title against all but the holder of a patent.
3. **Register and Receiver.** The rulings of the register and receiver as to the rights of respective claimants to lands under the laws of the United States cannot be questioned collaterally.

ERROR to the district court for Colfax county. Tried below before Post, J.

Phelps & Thomas, for plaintiff in error.

Russell & Chambers, for defendant in error.

LAKE, CH. J.

This controversy concerns the ownership of a quantity of corn grown in 1879 upon the east half of the northwest quarter of section thirty-two, township eighteen, range four, in Colfax county. This tract is claimed by both of these parties—by the former under the pre-emption, and by the latter under the homestead law of the United States. The action was replevin.

The agreed statement of facts on which the case was tried below shows that for several months prior, and up to February 17th, 1879, Kinney had claimed the tract under the timber culture law of congress, when his claim, for some reason undisclosed, was "cancelled." That while he was so claiming the land, he broke several acres, including that portion on which the corn in question was raised, and made other valuable improvements, of which there was a dwelling house, stable and corn crib, and during the year 1879 was residing thereon with his family.

Upon the cancellation of his timber culture claim, Kinney sought to hold it by pre-emption, and with that view offered to the register and receiver of the proper land office his declaratory statement, which these officers, on the 19th day of February, 1879, rejected. From this decision against his effort to pre-empt, Kinney took an appeal, which, at the time of the trial of this case in

the court below, was still pending before the Secretary of the Interior in Washington. It is admitted that, personally, Kinney was "a qualified pre-emptor."

On the other hand, it appears that Degman, who, in the spring of 1879, ploughed the ground and planted the corn, and also cultivated and cared for it "until maturity," bases his claim to the land upon "a homestead receipt," or certificate issued to him by the receiver of said land office, on the 20th of February, 1879, which is still "uncancelled." And, in addition to this, it is agreed "that on or about the 13th and 14th days of October, 1879, the said Kinney, by his agent, gathered and removed from said premises the said six acres of corn, during the absence, and without the knowledge or consent, of said plaintiff." That said corn was of the value of \$44.70, and its return was duly demanded before the commencement of the action.

With these facts before him, we are of opinion that the district judge rightly ruled that Degman was the owner of the corn which he had raised, and entitled to recover. Kinney's alleged timber culture claim was cancelled. And, no appeal having been taken, the entire justness of the cancellation must be inferred, and Kinney precluded from claiming anything against this ruling of the register and receiver. Besides, Kinney's attempt to acquire the land by pre-emption, shows very satisfactorily that he had ceased to regard himself as entitled to anything under the timber culture law. And thus we have presented the case of two parties, each in possession of a portion, but claiming a right to the whole tract. One of these parties—he who planted, cultivated, and cared for the crop until fit to be harvested—having his possession fortified by a duplicate land office receipt, showing that his claim was duly recognized as a valid one by the land department of the government, whose duty it is, in the first instance, to decide between such claimants; the

Kinney v. Degman.

other, the apparently surreptitious gatherer of a crop which he had neither planted nor cared for, with no evidence of any recognition of his claim by the land officers, save in its rejection. Between parties thus circumstanced justice would seem to demand that he who planted should have the benefit of the crop.

But further, the land office receipt, under our law of evidence, was sufficient proof of title in Degman to enable him to defend successfully his possession of the land, and whatever he had grown thereon, as against the mere naked claim of superior right presented by Kinney.

Sec. 411 of the code of civil procedure, Comp. Stat. 588, provides that: "The usual duplicate receipt of the receiver of any land office, or, if that be lost or destroyed, or beyond the reach of the party, the certificate of such receiver, that the books of his office show the sale of a tract of land to a certain individual, is proof of title equivalent to a patent against all but the holder of an actual patent."

Another fact, not before noticed, is given by Kinney as a justification for taking the corn, viz: That he notified Degman of his claim to the land, and that if he planted a crop thereon, he, Kinney, "would gather it." This notification, under the circumstances above given, was of no consequence. It neither benefited Kinney, nor prejudiced Degman on the question of the ownership of the corn. Degman's interest did not depend upon a want of notice of Kinney's claim of ownership at all, it rested upon his own right under the law as evidenced by the receiver's receipt, which he held. The action of the land officers in rejecting the claim of Kinney and accepting that of Degman is not subject to question in this collateral controversy. The judgment of the district court is clearly right and must be affirmed.

JUDGMENT AFFIRMED.

. MAXWELL, J., dissented.

SCHOOL DISTRICTS NOS. 16, 32, 37, 39, 53 AND 64, OF
HAMILTON COUNTY, PLAINTIFFS IN ERROR, v. SCHOOL
DISTRICT, No. 9, OF HAMILTON COUNTY, DEFENDANT IN
ERROR.

12	241
14	489
17	516
12	241
459	52

Pleading: SCHOOL DISTRICT. To state a cause of action against a school district for money "paid, laid out and expended," for its use, and at its request, facts must be averred which show that the supposed indebtedness was such as the district could lawfully incur.

ERROR to the district court for Hamilton county.
Heard below, on demurrer to the petition, by Post, J.
Demurrer sustained and cause dismissed.

Abbott & Caldwell, for plaintiff in error.

The action is not for money loaned, but for money "paid," and it is not necessary to state that the indebtedness was lawfully incurred. *Maxwells Pl. & Pr.*, 152, 153. *1 Nash Pl. & Pr.*, 151, and cases cited.

A. W. Agee, for defendant in error, cited *The People, ex rel. Hunter v. Peters*, 4 Neb., 255. *School District v. Stough, Id.*, 357. *Merrick County v. Batty*, 10 Neb., 176.

LAKE, CH. J.

The error complained of was in sustaining a general demurrer to the petition. The action was brought by school districts Nos. 16, 32, 37, 39, 53 and 64, of Hamilton county, against district No. 9, to recover a sum of money alleged to be due in these words, viz: "that the said defendant was, on the 14th day of January, A. D. 1878, indebted to the said plaintiffs in the sum of seven hundred dollars and ninety-six cents, for so much money before that time by the said plaintiffs paid, laid out and expended to and for the use of the said defendant, and at its request; and which said sum of money the plaintiffs

Sechler & Brotherton v. Stark.

aver was then due and payable, yet the said defendant, though often requested, hath not paid said sum of money, or any part thereof, or any interest thereon. Wherefore the said plaintiffs pray judgment," etc.

If the parties to this action were private persons, probably this statement would support a judgment for the amount demanded, and therefore withstand the demurrer. But, being school districts — mere creatures of statute — and possessing no powers whatever beyond those given by the legislature, they are unable to contract, *ad libitum*, as individuals may do, but only respecting objects, and to the extent the laws permit, and a more definite statement is required. Enough should be stated to show that the alleged indebtedness was one which the district could incur. In this petition, very clearly, there is not. We have no right to infer from the fact that money was paid, laid out and expended, to and for the use of a school district, and at its request, that the expenditure was a lawful one.

While it is true that, under the code, great liberality is required in construing pleadings, still this general rule must not be lost sight of, that when presumptions are indulged, they must be taken most strongly against the pleader. With no facts alleged showing the character of the supposed indebtedness, this rule requires us to infer that it was not such as the district could lawfully incur. We think that the demurrer was properly sustained, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

SECHLER & BROTHERTON, PLAINTIFFS IN ERROR, v. W.
L. STARK, DEFENDANT IN ERROR.

Costs in an Action: LIABILITY FOR. The plaintiff in an action, and also the defendant, is primarily liable for all costs which he

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makes, and their payment or security may be required in advance. Nor does the fact that his adversary may ultimately be compelled to pay them by the judgment of the court, relieve him from such liability to the officer entitled thereto.

ERROR to the district court for Hamilton county. Heard below before Post, J., on demurrer by Sechler & Brotherton to petition of Stark, plaintiff there. Demurrer overruled, and judgment in favor of Stark for amount claimed.

J. S. Miller, for plaintiff in error.

E. J. Hainer, for defendant in error.

LIKE, J.

Two errors only are assigned. They are: 1st. That "the court erred in overruling the demurrer to the petition;" and 2d, "in rendering a judgment for the plaintiff when it ought to have been rendered for the defendants."

The petition certainly states a good cause of action, although an exceedingly small one, the amount claimed being only one dollar and fifty-five cents. The facts showing this indebtedness are set forth with great particularity, and all due formality. The amount is composed of several items of costs made by the plaintiffs in error, and earned by the defendant in error as county judge in an action which they instituted and prosecuted to final judgment, in the county court of Hamilton county, against one Michael Cross.

The plaintiff in an action, and also the defendant, is primarily liable for all of the costs which he makes in its prosecution or defense. Nor does the fact that his adversary may ultimately be compelled to pay them by the judgment of the court, relieve him from such liability to the officer entitled thereto. The primary liability is a matter between him and the officer earning the fees; the ultimate liability concerns him and his adversary.

Under our law, court costs may be required to be paid or secured in advance of the performance of the required service; and the fact that it is not done in all cases is due merely to official favor.

Sec. 31, Ch. 28, Comp. Stat. 280, provides that: "The clerk of the supreme court, and of each district court, the register in chancery, probate (county) judge, sheriff, justice of the peace, constable, or register of deeds, may in all cases require the party for whom any service is to be rendered, to pay the fees in advance of the rendition of such service, or give security for the same, to be approved by the officer."

The several items of fees sued for were the following, viz: Docketing the case, 25 cents; issuing summons, 50 cents; filing papers, 20 cents; swearing witness, 10 cents; entering judgment, 50 cents; in all \$1.55. The petition, which by the demurrer is admitted to be true, shows that the official services for which these items were charged, were duly rendered by the defendant in error as county judge, at the request of the plaintiffs in error. And the charges conform to the statutory rule of compensation in each particular. As to the matters complained of, clearly there is no error, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

13	244
20	482

THE COUNTY OF PLATTE, PLAINTIFF IN ERROR, v. LEANDER GERRARD AND MICHAEL WHITMOYER, DEFENDANTS IN ERROR.

1. **County Commissioners: EMPLOYMENT OF ATTORNEY.** Previous to the passage of the act of March 1st, 1879, entitled "An act concerning counties and county officers," the provision of the statute, making it the duty of the district attorney to "without fee or reward (other than his salary) give opinions and advice to

Platte County v. Gerrard.

the board of county commissioners of any county in the district" etc., was exclusive of all other lawful methods of obtaining opinions or advice at the public expense.

2. —: —. A contract entered into by a board of county commissioners with a firm of attorneys, by the terms of which in consideration of the advice and services of said attorneys rendered to the county, to enable such commissioners to lawfully place upon the tax list of said county certain lands which had been erroneously left off of the assessment roll by the assessors, said commissioners agreed to pay said attorneys a sum equal to 25 per centum of all taxes, which should be collected on said lands for the year in question, *Held*, void as against public policy.

ERROR to the district court for Platte county. The action there was brought by Gerrard and Whitmoyer. The cause was sent to a referee who reported the following facts:

First. That in the year 1873, the Burlington and Missouri River Railroad Company were the owners of certain lands in Platte county, Nebraska, subject to taxation, which were omitted from the tax rolls for said year 1873.

Second. That in the month of September, or October, 1874, plaintiffs and the board of county commissioners of said county, while in session, entered into a contract or agreement, by the terms of which the plaintiffs agreed to take charge of the matter and see to having the said lands properly placed upon the tax rolls and tax list for the taxes for the year 1873, plaintiffs to see to the issuing of the proper notice, and to give such directions and advice to the proper officers as should be necessary to secure such results, and that in consideration therefor the board of county commissioners in behalf of said county agreed to pay to plaintiffs for such services, twenty-five per cent. of the amount of such taxes, for the year 1873, payable only upon the event of such taxes being collected according to law.

Third. That plaintiffs were at said time regular practicing attorneys in said county.

Fourth. That plaintiffs fully complied with and performed their part of the contract.

Fifth. That such action was had under the law that the said lands were placed upon the tax lists for the taxes for the year 1873.

Sixth. That said taxes remaining unpaid, the said lands were on the 20th day of May, 1880, sold to the county of Platte for such delinquent taxes, under the provisions of an act approved February 27th, 1879, entitled "An act to authorize certain county and municipal officers to purchase real estate at tax sale," that certificates were issued by the treasurer in due form to said county, and that the amount expressed in said certificates for the taxes of said year 1873, amounted to \$5,766.83 and that soon thereafter and prior to the commencement of this action the county commissioners of said county sold and assigned said certificates to one Peet, and realized thereon sixty per cent. of said sum of \$5,766.83, which equals \$3,460.09, which sum was paid to the treasurer about April 1st, 1880.

Seventh. If said contract is valid, plaintiffs are entitled for their services under said contract to the sum of \$1,441.70.

Eighth. That during the years 1873 and 1874, M. B. Hoxie was the district attorney for the 9d judicial district of Nebraska. That said Platte county was within said district. That the court duties devolving upon said district attorney rendered it impossible for the county commissioners and other county officers to procure the services and advice of the district attorney in the matters for which plaintiffs services were rendered, and that it was important that the said commissioners should have assistance and direction in said matter in order to protect the rights and interests of said county.

And as conclusions of law the referee found:

First. That the contract was one which the board of

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county commissioners were not authorized to make on behalf of the county.

Second. That judgment should be rendered against plaintiffs.

On hearing in the district court, before Post, J., the conclusions of law of the referee were set aside and judgment rendered against the county for \$1,441.70.

Charles A. Speice and Byron Millett, for plaintiff in error, cited Gen. Stat., 237, sec. 33. *Cuming County v. Tate*, 10 Neb., 193. *McDonald v. Supervisors*, 41 Wis., 642. *Montgomery v. Supervisors*, 22 Wis., *69. *Butler v. Milwaukee*, 15 Wis., *493. *Case v. Shawnee County*, 4 Kansas, 511. *Vise v. Hamilton County*, 19 Ill., 78.

Whitmoyer, Gerrard & Post, for defendants in error.

The county commissioners had authority to make the contract. Note the language of our statute: "To sue and be sued." "To make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate or administrative powers." Words could scarcely have been used more general in their scope and effect or conferring more extended powers upon the several counties as bodies corporate or politic. The power to employ counsel, as a necessary incident to the power to sue and be sued, is expressly affirmed by the following authorities: *Dillon on Municipal Corporations*, 1st Ed., 399. *Smith v. Mayor*, 13 Cal., 531. *Hornblower v. Dunden*, 35 Cal., 670. *Ellis v. Washoe County*, 7 Nevada, 293. *Tatlock, et al., v. Louisa County*, 46 Iowa, 138. *Thatcher v. Jefferson County*, 13 Kansas, 182.

COBB, J.

While we by no means admit the correctness of the proposition laid down by counsel for the defendants in error, to-wit: That "the power to employ counsel on the

part of a board of county commissioners is a necessary incident to the power to sue and be sued," we might safely do so, without by any means approving of the judgment in this case.

This was an action not for the value of professional services, nor yet upon a contract to pay an agreed price or sum for certain professional services; but upon a contract to pay to the defendants in error one-fourth part of such taxes as might be collected upon certain lands, situated in said county, in consideration of the said defendants in error having "undertook and agreed to act as attorneys for said defendants, (the board of county commissioners of Platte county,) in a proceeding to collect the taxes on said lands, from said railroad company, in said year, and to take all necessary steps in the name of said county, and perform all other acts as such attorneys, which might be necessary to confer jurisdiction on said defendants as such commissioners, to order said lands placed on the tax list of said county for said year, and to legally assess the said lands for said year 1873," etc. It is therefore not to the statute giving counties the power to sue and be sued, that we should look for the authority on the part of the county commissioners to make a contract of this character. The county was not sued, and it neither expected to be, nor did it contemplate suing anybody. But if we expect to find any such authority, should we not rather look to the statute then in force, empowering counties to levy and collect taxes? We think so. But it is not claimed, nor can it be, that the revenue laws then in force conferred any such power.

The revenue laws, as well those then as now in force, impose important duties upon the board of county commissioners, upon assessors, clerks and treasurers; many of these duties are such as to call for a high order of business capacity, all of which is, or should be, duly

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considered by the people in selecting persons to fill these important trusts. And yet the legislature had foreseen that occasions might arise when these boards and officers would, in order to the proper discharge of their duties, require legal advice, and ample provision had been made to meet this contingency.

Section 16 of chapter 7, Compiled Statutes, makes it the duty of the district attorney to "without fee or reward, (other than his salary,) give opinions and advice to the board of county commissioners of any county in the district, and other officers of the state or county, upon all matters in which the state or county is a party, or may be interested."

Again by sec. 18, district attorneys are authorized "in his discretion to appoint one or more deputies," etc.

The proposition that, because the district attorney might have been otherwise officially engaged, the board of county commissioners might seek advice from other attorneys, and pay for it out of the public money, is, in our opinion, inadmissible. It was a question for the consideration of the legislature, whether, owing to the rapid increase of the population of the state, and the consequent augmentation of the official duties of the district attorneys, as imposed by law, some measure of relief was not necessary for these officers. This the legislature was not slow to perceive; hence the provision contained in sec. 47 of Art. I., of chapter 18, Compiled Statutes. But at the date of the transaction involved in the case now under consideration, the law-making power having imposed upon the district attorneys the duty of giving opinions to and advising boards of county commissioners, such regulation and method was binding upon the courts and all boards and officers whatever, and was exclusive of all other lawful methods of obtaining opinions or advice at the public expense by boards of county commissioners.

But let us suppose this not to have been the case, that the board of county commissioners might at their discretion employ counsel of their choice, to advise them as to their duties, and pay therefor either an agreed price, or a *quantum meruit* out of the public funds; does it follow that such board might, as a mode of compensation for such advice, lawfully bargain away an aliquot part of such of the public revenues as might be affected thereby? And making such compensation contingent upon the success of the measures taken under such advice? We think not. The giving of contingent fees, or compensation for services rendered to the public, is contrary to sound policy.

It is the spirit of our laws to collect from the people only such amount of money by taxation as may be sufficient to a certain and economical support of the government in all its branches, and to require the strictest accountability therefor. The law has provided for all officers and public servants, having to do with the levy and collection of taxes, a fixed salary, depending in no degree upon the amount of taxes actually collected, and while in some of the Latin nations of Europe there was formerly, and may yet be, a system of farming out the collection of the public revenues, we do not think that such a thing was ever known, or would be tolerated, in any country inhabited by an English speaking people.

The referee did not return the testimony in the case, but looking only to the cause of action as set out in the petition of the plaintiffs in the court below, and the law of February 27th, 1873, we fail to see any equality between the services performed, agreed to be performed or required, and the compensation claimed therefor. Indeed, we can scarcely conceive of a board of county commissioners and a county clerk lacking of sufficient ability to understand and execute the law in question, without legal advice or opinion from any source.

We are therefore of the opinion that the contract, as set out in the pleadings and found by the referee, was one which the board had no legal power to make, and which cannot be upheld by the courts.

The judgment of the district court is reversed, and the conclusion of law found by the referee affirmed.

JUDGMENT ACCORDINGLY.

MAXWELL, J.

I concur in the judgment of reversal in this case upon the ground that the services rendered by the defendants were not rendered by them in a professional capacity, the only services being to induce the county commissioners to do their duty by placing certain lands on the assessment roll. But, in my opinion, the board of county commissioners have authority, independently of the statute, to employ an attorney in a proper case.

A county is a *quasi* corporation, and the commissioners the agents by which its business is conducted. If the county is sued, may the commissioners not defend, nay, is it not their duty to make any defense to which the county is entitled, and for this purpose to employ an attorney? The district attorney is not the attorney of the county. He is paid by the state. His duties are such that it would be impossible for him to prosecute or defend the various actions in which the counties in his district are interested. Then, suppose the county has a cause of action existing in its favor, against an individual or individuals, may it not employ an attorney to prosecute the same? I think it may, as a corporation, employ the necessary counsel at a reasonable compensation, to advise the commissioners, or prosecute or defend actions in which the county is interested.

In the case of *Cuming County v. Tate*, 10 Neb., 193, the services were not rendered for the county, but for the district attorney, and this court held that there could be

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no recovery against the *county* for such services, but that rule would not apply where legal services were rendered for the county.

12	252
16	684
12	252
39	274
12	252
46	79
12	252
48	873
12	252
50	529

THE STATE OF NEBRASKA, EX REL. THE BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, v. WALTER L. WHITTEMORE.

1. **County Clerks: FEES.** In counties containing less than 8,000 inhabitants county clerks are also clerks of the district courts of their respective counties. The duties being imposed upon them as county clerks, they must report the fees received by virtue of their office.
2. **Constitutional Law.** The act to regulate fees, approved February 15th, 1877, is not an amendment of sections 1, 5, 8 and 14, of chapter 19, of the revised statutes of 1886, but an original act.

ORIGINAL application for mandamus.

A. W. Agee and *E. J. Hainer*, for relator.

Mason & Whedon and *J. S. Miller*, for respondent.

MAXWELL, J.

In the year 1879 the defendant was elected clerk of Hamilton county, and has performed the duties pertaining to that office since the 8th day of January, 1880. Hamilton county at the time of his election contained less than 8,000 inhabitants, and therefore he, as county clerk, has performed the duties of clerk of the district court of that county. He has duly reported the fees received by him, except those pertaining to the district court. This is a proceeding by mandamus to compel him to make a report of all fees received by virtue of his office. The question to be determined is whether or not the office of clerk of the district court in counties con-

taining less than eight thousand inhabitants is a separate office from that of county clerk. In other words, are the duties as clerk of the district court imposed upon him as county clerk?

The question now presented was before this court in the case of *The People v. McCallum*, 1 Neb., 182. The legislature of 1869 abolished the office of clerk of the district court, and imposed the duties pertaining to this office on the county clerk. McCallum was elected county clerk of Otoe county in 1867, and again in 1869, and had given bond and taken the oath required as such clerk, and was performing the duties of that office at the time the act of 1869 making him *ex-officio* clerk of the district court of that county took effect, but gave no bond, nor took the oath as clerk of the district court. The action was to oust him from performing the duties pertaining to the district court, upon the ground that he had failed to qualify. Judge Crounse, in an elaborate opinion, shows that the duties were to be performed by McCallum as county clerk. On page 201 he says: "But I confess I mistake the purport of the term *ex-officio*, if McCallum, by virtue of his office, by his election, taking the oath of office and giving the bond required as county clerk, is not entirely competent and entitled to discharge the duties as clerk of the district court for Otoe county. Those duties are added to, and imposed upon, those who hold the office of county clerk. There is no loss of security arising from it. The bond required of county clerks is not less than three thousand dollars, and may extend to ten thousand. In this case it was placed at six thousand, and the presumption is that it will always be fixed with reference to all the duties to be discharged. The bond heretofore required was but three thousand dollars of the district clerk. It cannot be, as contended, that the bond given for the faithful performance of his duties as county clerk will not extend to acts done as clerk of the district

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court. That he may sign himself in one case as county clerk, and in another as clerk of the district court, is an immaterial circumstance. His acts are all done under the election and qualification as county clerk, and his bond is given to cover any of them. As well might it be contended that the official bond of any officer is no security for the want of faithful discharge of any additional duty, which may, from time to time, be imposed upon such officer by law." We adhere to the decision in that case, and it is decisive of the question.

Objections are made to the constitutionality of the act of 1877, upon the ground that it was an amendment of sections 1, 5, 8 and 14, of chapter 19, of the Revised Statutes of 1866, and therefore is within the rule of *Smails v. White*, 4 Neb., 353; *Ryan v. The State*, 5 Id., 276; *Sovereign v. The State*, 7 Id., 409, and not being a complete act in itself, is void. It is sufficient to say that the act referred to is not an amendment, but an original act. The officers designated are required to charge and collect fees, as before the passage of the law, but all fees in excess of a specific sum are to be paid into the county treasury. The act in question provides for the appointment by the county commissioners of such deputies as are deemed to be necessary; but even if it did not, an officer must perform the duties imposed upon him by law.

A peremptory writ is awarded as prayed.

JUDGMENT ACCORDINGLY.

12	254
13	270
17	516

12	254
80	456

THE UNION PACIFIC RAILROAD, PLAINTIFF, v. THE COUNTY OF DAWSON, DEFENDANT.

1. **Taxes: SINKING FUND.** The county commissioners have no authority to divert a sinking fund tax from the purpose for which it was raised and transfer it to the general fund.

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2. ———: ———: TRANSFER. The act of 1875 merely authorizes the transfer to the general fund of the surplus sinking fund, after the debt for which it was levied is extinguished.
3. ———: SCHOOL TAXES. In 1879 school taxes for all purposes were restricted to a sum not exceeding twenty-five mills on the dollar valuation. *B. & M. R. R. Co. v. York County*, 7 Neb., 487, adhered to.

ORIGINAL application for injunction.

A. J. Poppleton, for plaintiff.

C. W. McNamar, for defendant.

MAXWELL, J.

This is an original action brought to restrain the collection of a sinking fund tax, levied upon the property of the plaintiff in Dawson county, in the year 1879, and also school taxes levied in excess of twenty-five mills on the dollar valuation in school districts No. 5, 6, 7, 11, 13, 17 and 27, of said county, in said year. A referee was appointed to take testimony, and his report is now before the court. During the pendency of this action, the case of the *U. P. Railway Co. v. Dawson County*, has been determined, holding that the bonds in question are valid. The sinking fund tax, so far as is necessary to meet such obligations, is therefore valid and binding.

The plaintiff however insists, that under the prayer for general relief it is entitled to a decree enjoining the commissioners from mis-appropriating such funds. It appears from the testimony that \$8,089.18 of the sinking fund tax of that county, for the year 1877, was transferred to the county general fund; that in the year 1878, \$4,936.18, was transferred to the county general fund, and \$746.93 to the county road fund; that in the year 1879, \$8,768.68 was transferred to the county general fund, and that these several sums were so transferred by the order of the county commissioners, and that an order still exists upon their record, authorizing such transfers. The power to transfer funds appears to be claimed under the

provisions of an act: "To transfer surplus county sinking and other funds to the county general fund," approved February 15th, 1877, which provides: "That the board of county commissioners of the several counties of the state may appropriate to the county general fund any sinking fund in the county treasury, not levied for the payment of any bonded indebtedness; also any county moneys, from whatever source, excepting moneys levied for school purposes, that remain on hand in the county treasury, and are no longer required for the purpose for which the same were levied." [Comp. Stat., Chap. 18, Art. III, Sec. 4.]

A sinking fund tax is a tax raised to be applied to the payment of the principal and interest of a public loan. *U. P. R. R. v. Buffalo County*, 9 Neb., 449. *U. P. R. R. v. York County*, 10 Neb., 612.

Sec. 5, Art. IX, of the constitution provides that: "County authorities shall never assess taxes the aggregate of which shall exceed one and one-half dollars per one hundred dollars valuation, except for the payment of indebtedness existing at the adoption of this constitution, unless authorized by a vote of the people."

Sec. 30 of the revenue law, as amended in 1877, was as follows: "The rate of the general state tax shall not be less than one-half mill, nor more than four mills, on the dollar valuation; the rate of the state school tax shall not be less than one-half mill, nor more than two mills, on the dollar valuation; and the rate of the state sinking fund tax shall not be more than one mill on the dollar valuation, in any county in the state. For ordinary county revenue, including the support of the poor, not more than ten mills on the dollar; for county sinking fund such rate as in the estimation of the commissioners will pay one year's interest on all outstanding debts of the county, with not less than five per cent. of the principal." Laws 1877, 45.

The revenue law of 1879, [Comp. Stat., Chap. 77,] did not take effect until September 1st of that year, therefore the act of 1877 was in force at the time the taxes in question were levied.

The limitation upon the rate of taxation is for the protection of taxpayers, and to secure economy in the expenditure of public moneys. It is the evident intention of the law that only the amount required in any particular fund in one year shall be levied, and no more. If the law limits the levy for the ordinary county revenue to ten mills on the dollar valuation, no greater sum can be raised for that purpose by levying more than is required for a sinking fund, or any other tax, and then transferring the surplus to the general fund. If the law could thus be evaded it would afford no protection to taxpayers whatever. The act of 1877 merely authorizes the transfer of such portion of the sinking fund as is "no longer required for the purposes for which the same was levied." When will such funds be no longer required for the purposes for which they were levied? Evidently when the debt is paid in full, and not before. That is, if a surplus remains in the treasury after the debt is paid in full, it may be transferred to the general fund. But until such time the sinking fund tax must all be applied to the purposes for which it was raised, and a taxpayer may compel its application to that purpose. The plaintiff is therefore entitled to a decree enjoining the defendant from transferring such funds to the general fund of the county.

It appears from the testimony that the school districts above designated caused taxes to be levied in the year 1879, varying from thirty to sixty mills on the dollar valuation. The question here involved was before this court in the case of the *B. & M. R. R. v. York County*, 7 Neb., 487.

Sec. 81 of "An act to establish a system of public in-

struction for the state of Nebraska," approved Feb. 15th, 1869, provided that: "Any school district may, at any annual or special meeting, impose a tax on the taxable property of the district in any amount not exceeding ten mills on the dollar, on the assessed valuation of the property of the district, for the purpose of building a school house, and such tax, when voted, shall be reported by the district board to the county clerk, and levied and collected in the same manner as other taxes voted by the district."

Sec. 32 provided that: "The qualified voters, when assembled at any annual or special meeting, may, from time to time, impose such tax as may be necessary to pay teachers, to keep their school houses in repair, and to provide the necessary appendages, and to pay and discharge any debts or liabilities of the district lawfully incurred; may raise a sum sufficient for the purchase of books of reference, globes, maps, or any apparatus for the purpose of illustrating the principles of astronomy, natural philosophy, natural history, and agricultural chemistry, or the mechanic arts." Gen. Stat., 966.

In 1875 these sections were amended as follows:

Sec. 31. "Any school district may at any annual or special meeting impose a tax on the taxable property of the district in any amount not exceeding twenty-five mills on the dollar on the assessed valuation of the property of the district, and such tax, when voted, shall be reported by the district board to the county clerk, and levied and collected in the same manner as other taxes voted by the district."

Sec. 32. "The tax levied and collected, as provided by the preceding section, shall be expended under the direction of the district, or in the absence of such direction by the district, then such tax shall be expended as the district board of the proper district may direct." Laws 1875, 116.

It will be perceived that the power to vote taxes, given

by sec. thirty-two of the act of 1869, was entirely taken away by the amendment of 1875, the school district or board being merely authorized to expend the taxes voted under the provisions of section 81. The authority of a school district to impose taxes upon the persons and property within its boundaries is wholly statutory, and as the exercise of such taxation may result in transferring the title of property within the district, it must be clearly given and strictly pursued. The reckless manner in which many school districts expended the annual levy of taxes doubtless induced the legislature of 1875 to limit all the taxes voted by a school district to twenty-five mills on the dollar valuation. But whatever the motive may have been, the intention is clear to limit the levy to that sum. And no statute has been pointed out to us authorizing the imposition of a higher rate of taxation.

We are referred to sec. 13 of an act "To provide for the issuing and payment of school district bonds," approved February 26th, 1879, [Comp. Stat., Chap. 79, Subdivision XV.], as conferring authority to levy taxes in excess of twenty-five mills. But that it does not have that effect is clear, because the limitation in the amendment of 1875, Subdivision heretofore referred to, was still in full force. We adhere to our decision in the *B. & M. R. R. v. York County*, and the school district taxes set forth in the petition in excess of twenty-five mills on the dollar valuation will be enjoined. A decree will be entered in conformity with this opinion.

DECREE ACCORDINGLY.

RICHARD BARTON, PLAINTIFF IN ERROR, v. THE STATE OF
NEBRASKA, DEFENDANT IN ERROR.

Grand and Petit Jurors: SELECTION. County commissioners must select the names from which grand and petit jurors are to be drawn from the several precincts of the county, "as nearly as may be a proportionate number from each precinct" in proportion to the number of persons therein competent to serve as grand and petit jurors. The provisions of the statute prescribing this method are mandatory, and a party indicted by a grand jury, drawn from a list of names, selected without regard to equality between the several precincts as required by statute, may plead the same in abatement.

ERROR to the district court for Lancaster county. Tried below, before POUND, J. The opinion states the case.

Galey & Abbott, for plaintiff in error, cited *Burley v. The State*, 1 Neb., 396. *Preuit v. State*, 5 Neb., 375. *McElvoy v. State*, 9 Neb., 157. *Clark v. Saline County*, 9 Neb., 516.

C. J. Dilworth, Attorney General, for the State.

1. The plea in abatement does not state that sec. 664 was not complied with; it only claims the county commissioners did not select the names, as required by law. This is only one of the ways in which a grand jury may be selected, but it is not the only way, and the proceedings of a grand jury selected by the sheriff are just as lawful as though the names had first been selected by the commissioners; in fact the law requires this to be done when the commissioners fail to make the selection.

2. The cases cited by the plaintiff in error do not apply to this case. *Burley v. The State*, and *Preuit v. The State*, were cases where the record showed that the court made the selection, and not the sheriff. There is nothing of that kind claimed in this case. The case of

McElvoy was when the judge, in vacation, ordered the sheriff to summon the jury without giving the commissioners time or opportunity to make the selection. The case of *Clark v. Saline County* prescribes the manner in which the commissioners shall select the names, when in this case it is stated that the commissioners refused to make the selection. It then follows, therefore, that the jury must have been selected by order of the court by the sheriff, and it was not claimed that this was not done.

COBB, J.

The plaintiff in error was indicted and convicted at the June term, 1880, of the district court of Lancaster county, for the larceny of a horse. He presented a plea in abatement to the indictment, the substance of which is that the grand jury, which found the indictment, was not properly selected, or more correctly speaking, that in the selection of the sixty names, from which the grand jurors were drawn, they were not properly distributed among the several precincts of the county, in proportion to the number of persons residing in said precincts respectively, qualified by law to serve as grand and petit jurors. The plea was demurred to by the district attorney, and the demurrer sustained.

In the brief of the defendant in error it is tacitly admitted that the facts set up in and by the plea are sufficient, but it is contended that the plea is bad in not negating every possible method by which a legal grand jury could have been obtained.

The following is a copy of the plea: " * * * That the said indictment, as it is exhibited against him, was not found or presented to any court having jurisdiction of the offense therein charged by a regularly appointed and constituted grand jury, under the laws of the state of Nebraska, as appears from the record of said county

commissioners of said county, and the record of said court in this, to-wit: 1. The county commissioners of said county of Lancaster, in which the February term, A. D., 1880, of the district court, of the second judicial district of Nebraska, in and for said county, was appointed and directed to be held by the judge thereof, wholly failed and refused to meet, nor did any two of said county commissioners meet together at the time, before said term required by law, or at any other time, and then and there select sixty names, or any other number of names of persons possessing the qualifications of jurors, as prescribed in section six hundred and fifty-seven of the General Statutes of Nebraska, and, as nearly as might be, a proportional number from each precinct in said county, from which number so listed, the clerk, sheriff, or other officer of said court, might select, in the manner provided by law, the names of sixteen persons, to serve at the said term of the said court as grand jurors. 2. The persons who were selected by the clerk and sheriff of said county to serve as grand jurors at the said term of the said court, were not chosen from any list selected by the county commissioners of said county, or selected by any two of said commissioners, as provided by law. 3. The county commissioners of said county of Lancaster utterly failed and refused to select the names of sixty persons, or any other number, and furnish a list thereof to the clerk of said court, from which the names of persons to serve as grand jurors, at said term, in said court, might be drawn as provided by law. 4. The list of the names of persons, from which the clerk and sheriff of said court drew the names of sixteen persons to serve as grand jurors at the said term of the said court, were not selected as nearly as might be, proportionately, from each precinct in said county, but, on the contrary, this defendant avers the truth to be, that in one of the precincts of said county, to-wit: North Bluff precinct

there did not appear to be, nor was not on said list of sixty persons, drawn from as aforesaid by the clerk and sheriff aforesaid, a single name of any person resident, and possessing the qualifications of a juror in said precinct; yet said defendant avers that in said North Bluff precinct there resided at the last general election held in and for said county, and did reside therein fifteen days before the first day of the said term of the said court, and, at the time of the drawing of the grand jurors as aforesaid, at least sixty-seven persons possessing the qualifications of jurors as prescribed in section six hundred and fifty-seven of the General Statutes of Nebraska, relating to the qualification of jurors. And this defendant further avers that on the list of sixty persons from which the names of sixteen persons were drawn as aforesaid, there appeared in said list only seven names of persons residing in Capitol precinct, in said county, in which precinct there resided at the last general election, held in and for said county, and fifteen days before the first day of the said term of the said court holden as aforesaid, at least six hundred persons qualified to serve as jurors at the said term of said court, while on said list of sixty persons there appeared and was listed the names of eight persons, residents of Midland precinct, in said county, when at the last general election, held in and for said county, and fifteen days before the first day of said term of the said court, there resided only five hundred and thirty-four persons possessing the qualifications of jurors to serve at the said term of said court, wherefore," etc.

The following are the sections of the statute providing for the making of the list, etc.

Sec. 658. In each of the counties of this state, wherein a district court is appointed or directed to be holden, the county commissioners of the county shall, at least fifteen days before the first day of the

session of the court, meet together, or any two of them may meet, and select sixty persons, possessing the qualifications prescribed in section six hundred and fifty-seven, and as nearly as may be a proportionate number from each precinct in the county, and shall, within five days thereafter, furnish to the clerk of the district court of the county, or his deputy, a list of the names of the persons selected.

Sec. 659. The clerk or deputy clerk receiving the names shall write the name of each person selected on a separate ticket, and place the whole number of tickets into a box or other suitable and safe receptacle, and shall preserve the list of names furnished by the commissioners in the files of his office.

Sec. 660. The clerk of the district court, or his deputy, and the sheriff, or if there is no sheriff, the deputy sheriff, or if there is no deputy sheriff, the coroner of the county, shall, at least ten days before the first day of the session of the district court, meet together and draw by ballot out of the box or receptacle, wherein shall be kept the tickets aforesaid, sixteen names, and the persons whose names are drawn shall be grand jurors; and the clerk and sheriff shall then draw twenty-five additional names, and the persons whose names are drawn shall be the petit jurors.

Sec. 664. Whenever the proper officers fail to summon a grand or petit jury, or when all the persons summoned as grand or petit jurors do not appear before the district courts, or whenever at any general or special term, or at any period of a term, for any cause, there is no panel of grand jurors or petit jurors, or the panel is not complete, said court may order the sheriff, deputy sheriff, or coroner, to summon, without delay, good and lawful men having the qualifications of jurors, and each person summoned shall forthwith appear before the court, and if competent, shall serve on the grand jury or petit jury, as

the case may be, unless such person may be excused from serving, or be lawfully challenged.

According to strict rules of pleading, a plea in abatement is required to be certain to every intent. But, it is the spirit of modern law to look to the substance rather than to the form of almost every other proceeding, and why not of a plea in abatement? It cannot be denied that the plaintiff in error to some extent embarrassed his case by the three first clauses of his plea, which consist almost exclusively of negative matter. But rejecting these three clauses of the plea entirely, and looking only to the fourth one, we have come to the conclusion, not only that it contains all of the necessary allegations of a good plea in abatement, under a reasonable liberal construction, but also that it sufficiently negatives the suggestion, that possibly the grand jury that found the indictment was procured under the provisions of sec. 664.

By this plea the court and the prosecuting officers were sufficiently notified that the plaintiff in error claimed that, in the selecting of the names of sixty persons from which the grand jurors were drawn, the county commissioners had disobeyed the provisions of section 658, and, if it were true that the grand jury in question was in fact summoned under the extraordinary provisions of section 664, then we think that it was the duty of the district attorney under the provisions of sec. 446, of chap. XLII., of the criminal code, to have replied to the said plea setting up such fact, rather than to have demurred generally, as he did, thereby admitting the facts of the plea if well pleaded.

It is not only a provision of positive law, that jurors should be selected by means calculated to give equality and impartiality to every portion of the county, but such a result is in itself so fair and equitable, whether we consider service on juries as a burden necessarily imposed upon the citizen, or as a privilege to be enjoyed by

him, that it is almost incredible that such requirement of the law should have been so generally disobeyed by county commissioners; yet it is a matter of notoriety that such has been the case, even in counties where from their central position and other advantages, better things might well be expected of them.

In the case of *Clark v. Saline County*, 9 Neb., 516, this court, by the chief justice, declared the provisions of the statute in question to be mandatory, and cited numerous cases in which it had been held, that the security of the citizen was only to be assured by a faithful and rigid adherence to its requirements.

In the case of *McQuillen v. The State of Mississippi*, 8 Smede & Marshall, 587, the supreme court of Mississippi, construing a statute quite like ours, by the mouth of chief justice Sharky, uses the following language: "A grand jury does not, by our law, consist of thirteen or more men, congregated by the mere order of the court, or by accident, in a jury box; but it consists of the requisite number of competent individuals, selected, summoned and sworn, according to the forms of law, and if the law be not followed, it is an incompetent grand jury."

It is a matter of far greater importance that the law regulating the manner of laying the foundations for the selection of grand and petit jurors should be observed, than that any one man, however guilty, should be punished more or less; and having reached the conclusion that the demurrer to the plea in abatement was wrongfully sustained, without examining the other errors assigned, the judgment of the district court is reversed, the demurrer overruled, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JAMES D. MINKLER, ADMINISTRATOR OF THE ESTATE OF
ARTHUR ROY MINKLER, DECEASED, PLAINTIFF IN ERROR,
V. WILLIS W. WOODRUFF ET AL., DEFENDANTS IN ERROR,

Distribution of Estates: PLEADING. Petition alleged that *
* * A. R. M. died at Beatrice, Gage county, Nebraska,
intestate; that * * * plaintiff was duly appointed his ad-
ministrator, and has paid all funeral charges, debts of the
deceased, and costs and expenses of administration; that de-
ceased left no issue or widow; that plaintiff is his father and
sole heir at law; that deceased left real estate in Indiana and
Minnesota, and personal estate in Ohio, which estate is in the
possession of the defendant; but the petition does not state that
the deceased was at any time domiciled in Nebraska. *Held*,
that a general demurrer to the petition was rightly sustained by
the district court.

ERROR to the district court for Gage county. Heard
below on demurrer to the petition, by WEAVER, J. De-
murrer sustained and cause dismissed. The petition was
as follows:

The plaintiff says: That on the 25th day of Novem-
ber, A. D., 1879, the said Arthur Roy Minkler died in
Beatrice, Gage county, Nebraska, intestate; that on the
14th day of May, A. D., 1880, the said James D. Mink-
ler was duly appointed administrator of the estate of the
said Arthur Roy Minkler, deceased; that the said deceased
was seized of lands, tenements and hereditaments, and
of rights thereto and entitled to interests therein, and
was the owner and possessed of personal property and
choses in action at the time of his death; that the said
deceased, at the time of his death, had no issue nor widow,
and the said James D. Minkler was the father of the
said deceased; that all the debts, funeral charges and
expenses in the administration of said estate have been
paid, and the deceased had no family to provide expenses

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for the maintenance of; that the said James D. Minkler, father of the said deceased, and administrator of the estate of the said deceased, is the only heir of the said deceased, and is entitled to the residue of the said estate of the said Arthur Roy Minkler, deceased; that the said defendants, Willis W. Woodruff as executor of the last will and testament of Anna A. Woodruff, deceased, and Amos H. Woodruff, Nodiah Woodruff, Henry Woodruff and Willis W. Woodruff, are uncles of the said Arthur Roy Minkler, deceased, and claim to have an interest in the residue of the real and personal estate of the said deceased; that the said Arthur Roy Minkler, deceased, was the only issue of the said James D. Minkler and Amelia Minkler; that the said Amelia Minkler died on the 9th day of April, A. D., 1876; and the said Arthur Roy Minkler and the said James D. Minkler were the only heirs of the estate of the said Amelia Minkler, deceased; that the following property remains of the estate of the said Arthur R. Minkler, deceased, to which the said James D. Minkler is the sole heir, to-wit: An undivided one-half of a tract of land, more particularly described as follows: commencing at a stake 1,184 feet north of the southeast corner of the west half of the northeast quarter of section 36, in township 13, range 7 west, thence north 81 feet, thence west 270 feet, thence south 81 feet, thence east 270 feet to the place of beginning, containing one-half acre in the county of Clay, and state of Indiana; also an undivided one-half interest in the northwest quarter of the northwest quarter of section 2, in township 13 north of range 7 west, containing 418 63-100 acres, in Clay county, Indiana; also an undivided one-half interest in lots number twenty-five (25) and twenty-six (26), in Shattack's third to the city of Brazil, Clay county, Indiana; also an undivided one-third interest of an undivided one-half interest in certain lands, hereditaments and appur-

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tenances thereunto belonging, situate in the city of Minneapolis, county of Hennepin, and the state of Minnesota, the said property being formerly owned by Anna A. Woodruff, deceased, and by her bequeathed to Amelia Minkler and Arthur Roy Minkler, deceased, to-wit: west half of east half of northeast quarter of section 2, township 28, range 24. And also lots number one and two, in block number twenty-one, in Ashton and Sherburne's addition, in the city of Saint Paul, Ramsey county, state of Minnesota; and the plaintiff further says that the said James D. Minkler is the owner of an undivided one-half interest in the said described real estate in the state of Indiana in his own right, and that he is the owner of the said above described real estate, situate in the state of Minnesota, in his own right, by virtue of a tax sale and deed therefor, duly issued to him March 31st, 1877, and that the said Arthur Roy Minkler died possessed only of an undetermined interest in the same; that the following personal property remains of the estate of the said Arthur Roy Minkler, deceased, to which the said James D. Minkler is the sole heir, to-wit: One thousand dollars of bank stock and the dividends thereon in the First National Bank of Youngstown, Ohio, which said stock and dividends was formerly owned by Anna A. Woodruff, deceased, and by her given by will to the said Amelia Minkler, and inherited from her by the said Arthur Roy Minkler, deceased, and is now in the possession of the said Willis W. Woodruff, executor of the last will and testament of the said Anna A. Woodruff, deceased, and also other personal property of the value of \$300.00, in the hands of plaintiff, in Gage county, Nebraska, and in the hands of Willis W. Woodruff, executor aforesaid; that the said defendant, Willis W. Woodruff, executor of the last will and testament of Anna A. Woodruff, deceased, neglects and refuses to pay over and deliver up to the said James D. Minkler the

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said one thousand dollars of bank stock, with the dividends thereon, or any part thereof.

Wherefore, the plaintiff prays that the said James D. Minkler be decreed to be the owner of the foregoing real estate and personal property, and the personal property in his hands as administrator, and to be the sole heir of the estate of the said Arthur Roy Minkler, deceased; that the said defendants, and each of them, be required to set forth their interest and claim to, in and against the said property, and that the same be determined, and that the said James D. Minkler shall have the right to demand and recover the said real and personal property of and from the said defendants, and each of them having the same, and that the title to and the claims of the said defendants, and each of them, to the said property, or any part thereof, be decreed to be null and void as against the title and interest of the said James D. Minkler, and the plaintiff asks for such other and further relief as to the court may seem just and equitable.

Colby & Hazlett, for plaintiff in error.

Bush & Rickards, for defendants in error.

COBB, J.

This case turns upon a single point. The plaintiff fails to state in his petition that the deceased, Arthur Roy Minkler, was domiciled in the county of Gage at the time of his death. Such an allegation is necessary, not only to give the district court of Gage county jurisdiction to distribute the estate of the deceased, but as a substantive fact, necessary to be plead with the others, in order to make out a cause of action.

If Arthur Roy Minkler had his domicile in Gage county at the time of his decease, and having died intestate, leaving personal estate, the district court of that county had jurisdiction to adjudicate its distribution. In such

case the distribution must be made in accordance with the laws of this state; under which the deceased, having neither wife, children, or the issue of a child, his father would be his sole heir at law, and if necessary, could bring suit in the proper court of Gage county to have such estate decreed to him, and could make the proper persons parties to such suit wherever they might be. But all this depends upon the domicile of the deceased at the time of his death. That is the capital fact of the case, and it is left out of the petition. The allegation in the petition that the deceased died in Gage county, does not supply the place of an allegation that he was domiciled there, although it may be, that for some purposes, in the absence of a suggestion to the contrary, a person will be presumed to be domiciled where he may be shown to be in point of fact; but here the plaintiff brings a suit against non-residents of the state, and as it is apparent that his right to a recovery in such suit, nay, that the jurisdiction of the court over it, depends upon this fact, surely it should be presented in a manner to enable the defendants to deny it, if so advised.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

MORRELL C. KEITH AND GUY C. BARTON, PLAINTIFFS IN ERROR, v. JOHN TILFORD, DEFENDANT IN ERROR.

1. **Trespass: HERD LAW.** The remedy for trespass by livestock upon cultivated lands, by impounding, notice to the owner, arbitration, etc., as provided by the act of March 8, 1871, is a cumulative and not an exclusive remedy.
2. —: **EVIDENCE.** Evidence showed the market value of corn "near" the site of the destroyed crop; *held*, sufficient *prima facie*.

12	271
37	366
12	271
38	618
12	271
41	471
41	501
12	271
51	541
13	371
57	269
57	705

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3. ———: ———. Evidence of the destruction of a field of corn by a herd of about six hundred cattle. Witnesses recognized the brand and ear marks of the defendants below, on about two hundred of the cattle of the herd. No evidence of any of them being unbranded, unmarked, or bearing any other brand, or mark. *Held*, sufficient *prima facie*.
4. ———: TITLE: U. S. LAND. The exclusive peaceable possession of lands, the title of which is in the United States, under a preemption filing, which had expired under the law, *held*, sufficient as against a trespasser.

ERROR to the district court for Lincoln county, to which the cause had been brought on appeal from the county court. The action was brought by Tilford for damage done to his crops by cattle of Keith and Barton. On trial in district court, before GASLIN, J., and a jury, he obtained a verdict and judgment for \$100 and costs, to reverse which Keith and Barton came here upon a petition in error.

Hinman & Neville, for plaintiffs in error, cited *Hurford v. Omaha*, 4 Neb., 350. *Dudley v. Mayhew*, 3 N. Y., 9. *Cole v. Muscatine*, 14 Iowa, 296. *Johnston v. Louisville*, 11 Bush., 527. *State, ex rel., v. Marlow*, 15 Ohio State, 134. *Delaney v. Errickson*, 10 Neb., 499. *Hardmann v. Bowen*, 39 N. Y., 199. *Carragus v. The Board of Commissioners*, 39 Ind., 66.

John De Lany, for defendant in error, cited 3 Blackstone, 211. Gen. Stat., Chap. X.

COBB, J.

There is a very important question raised by the record in this case, which has not heretofore been passed upon by this court. The plaintiffs in error contend that by virtue of the act of March 8, 1871, entitled "An act for a general herd law, and to protect cultivated lands from trespass by stock," the remedy given in said act, by distress, impounding, notice, arbitration, etc., is made the

exclusive remedy in cases of trespass by live stock on cultivated lands. [Comp. Stat., Chap. 2, Art. III.]

There can be no doubt of the correctness of the proposition, to which plaintiffs in error cite numerous authorities, that "Where a statute confers a right and prescribes adequate means of protecting it, the proprietor of the right is confined to the statutory remedy." But the right of every man to the uninterrupted enjoyment of the produce of his cultivated fields must, even in Nebraska, have dated further back than April 1, 1871. While it must be admitted, that some of the language used by way of argument and illustration in the opinion of this court in the case of *Delaney v. Errickson*, 10 Neb., 492, seems to imply that prior to the passage of the act, known as the general herd law, there was no law in this state for the protection of even cultivated lands against trespass by live stock, yet, it cannot be claimed that the opinion, taken as a whole, need lead one to such a conclusion. Such certainly neither was nor is the view of the court on that point.

Growing or standing cultivated crops have always, for most purposes, been deemed personal property, not so with growing wild grass and other natural products of the soil; and while technically the form of the action for injury to growing crops recognizes the breaking and entering of the close as of the essence of the injury, yet its object is compensation for the loss of the produce of labor, personal property, and there is little or no essential difference between it and the action of trespass for the taking and carrying away of personal goods. The right to bring an action for an injury to, or the taking and carrying away of any species of chattels, including crops of grain, no doubt was suspended to the first settlers of Nebraska, until civil courts were organized therein for the protection of the rights of person and property, but it is difficult to conceive of a system of civil jurispru-

dence even of the crudest character which affords no protection to the cultivator of the soil in the enjoyment of his labor.

We are of opinion therefore, that the first section of the act of March 8, 1871, conferred no right to the people of this state, which they did not possess before its enactment.

The second clause of the second section did confer a new right in giving to the owners of cultivated lands, "a lien upon such trespassing animals," but the language of this section is such as to leave it an open question whether such lien cannot be enforced by means other than the impounding, etc., provided for in the succeeding sections of the act. But we do not doubt that where it is not sought to rely upon or enforce a lien, the owner of the trespassing stock may be proceeded against in trespass, as in the case at bar. Indeed we know of no case, outside of admiralty, where a party, although entitled to a lien, may not waive it and rely upon the personal responsibility of the defendant.

Referring to the authorities cited by counsel for the plaintiffs in error, it is not disputed that in order that an injured party be restricted to a special or statutory remedy, such remedy must be an adequate one. To judge of the adequacy of a remedy, a court must often take notice of the history and condition of the country, of its inhabitants, and of their industrial pursuits; but in this case the evidence furnishes us sufficient data for that purpose.

The plaintiff below was the owner and in possession of nineteen acres of corn and one acre of sorghum. The herd of the defendants, consisting of about six hundred head of cattle, ranged upon this field and destroyed the corn. To have pursued the special remedy, the plaintiff must have impounded all of these cattle; that is, shut them up in a close pen. Or putting the most liberal construction upon

the language of the statute, he must have restrained, confined and kept the cattle together in one place, until the completion of the notice, arbitration and payment of damages by the owners, or the sale of the cattle to pay such damages, which would occupy from four days to four weeks. In the meantime the cattle must be not only kept impounded, but furnished with food and water, at the ultimate cost of the owner to be sure, yet at the immediate cost of the owner of the destroyed crop. We assume that no one will consider this an adequate remedy or at all adapted to compensate the owner of the nineteen acres of corn, which the jury have valued at one hundred dollars, for the loss sustained. He must have been a capitalist to have made this remedy available.

As to the point that the evidence does not sustain the verdict, the uncontradicted testimony of the plaintiff below was, that there was nineteen acres of corn, and that it would yield from sixteen to twenty bushels per acre; that it would cost from three to four cents per bushel to gather and shell it, and that it was worth one dollar per hundred. He also testified that the corn was "near this town," North Platte, the place where the trial was held. Mr. Weary testified that he was a dealer in corn and feed in North Platte; that in 1877 corn was retailing at one dollar per hundred pounds, but by the quantity it was worth but ninety cents per hundred pounds. Nineteen acres at sixteen bushels per acre, would yield three hundred and four bushels, which at ninety cents per hundred pounds, would amount to one hundred and fifty-three dollars and twenty-one cents. From which deduct twelve dollars and sixteen cents, the cost of picking and shelling it at four cents per bushel, leaves one hundred and forty-one dollars and five cents. We think therefore, even if we reject the testimony of the plaintiff below, that the corn was worth one dollar per hundred pounds,

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there was sufficient evidence. The market price of corn near the site of the destroyed crop uncontradicted or explained, is sufficient.

The witnesses only recognized the brand and ear marks of the defendants below on about two hundred, of the herd of about six hundred, that destroyed the crops. None of them saw any other owner's brand or mark on any of them, nor do any of the witnesses speak of any unbranded cattle among them. One of the witnesses on the other side speaks of another large herd being in that vicinity, but there is no suggestion that the two herds ever became mixed together.

The exclusive peaceable possession of lands, the title of which is in the United States, without even claim of title on the part of the plaintiff, is sufficient against a trespasser.

The above views render it unnecessary to comment on the instructions given or refused. For, if we are correct in our view of the case, there was no error in that respect.

The judgment is affirmed.

JUDGMENT AFFIRMED.

12	276
15	120
18	112
12	276
31	166
12	276
62	780

A. R. GAGE, PLAINTIFF IN ERROR, v. JOHN M. ROBERTS, DEFENDANT IN ERROR.

1. **Pleading? ACTION ON NOTE.** In an action upon a promissory note it is sufficient to allege the making and delivery of the note, set out a copy of the same, and allege that there is due thereon from the maker to the plaintiff a specified sum.
2. —: —. Under section 129 of the code, where a copy of the instrument sued upon is set out as a part of the petition, it must be alleged that there is due thereon from the adverse party to the plaintiff a specific sum, unless these facts may be inferred from others pleaded.

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ERROR to the district court for Harlan county. Tried below before GASLIN, J.

J. H. Lucas, for plaintiff in error.

John Dawson, for defendant in error.

MAXWELL, J.

In September, 1880, the defendant filed the following petition in the district court of Harlan county:

"John M. Roberts v. A. R. Gage. The plaintiff states that this action is founded upon a promissory note, of which the following is a copy with the credits thereon:

REPUBLICAN CITY, May 10, 1878.

Twenty months after date I promise to pay to the order of John M. Roberts, six hundred and thirty-four dollars, (634.00), for value received, with ten per cent. interest thereon from date, and if the interest thereon is not promptly paid annually, the same shall become a part of the principal and bear the same rate of interest.

A. R. GAGE.

That no part of which has been paid except the sum of three hundred and twenty-six dollars and forty cents.

That there is now due plaintiff from defendant the sum of four hundred and thirty-eight dollars, for which he claims judgment with interest from the 10th day of May, 1878, and the costs of this action."

To this petition Gage filed a general demurrer, upon the ground that the facts stated in the petition did not constitute a cause of action against him. The demurrer was overruled and judgment rendered in favor of Roberts for the sum of \$542.50 and costs.

The error assigned in this court is that the court erred in overruling the demurrer. The objections seem to be that a copy of the note is set out as a part of the petition, and the failure to allege that Gage made and delivered the note to Roberts.

Judge Swan in his valuable work on Pleading and Precedents, pages 199, 200, says:

"Upon a note for the payment of specific articles, or upon a bond conditioned to perform some act, or upon a contract of guaranty, in these and the like cases, where the instrument relates solely to the facts constituting the cause of action, it is not only proper, but the best mode, to allege the making of the instrument, and then set it out in full and allege a breach. Again, the stipulation or covenant upon which the breach is assigned, is frequently either qualified or enlarged, or the right of the party complaining of its breach, is dependent upon his performance of all other stipulations of the agreement. In such cases, if the agreement is not copied into the pleading, it is, in general, necessary to recite substantially the whole agreement, and aver, generally or specifically performance, or an offer to perform; and, consequently, the party may, instead of such recital, copy the agreement into the pleading; for, these two modes of pleading are, in such cases, equally concise, definite and relevant to the facts. Thus, upon a building contract, or a policy of insurance, or an agreement between vendor and vendee for the sale of goods or real estate, and the payment of the purchase money; in these, and like cases, the stipulations on both sides being mutual and dependent, must be stated substantially in the words of the instrument, and a copy of the agreement may therefore be set forth in the pleading as a substitute for its recital. * * * It will be perceived from what has already been said upon this subject, that an instrument may be copied into the pleading whenever that mode of stating the facts does not introduce such an amount of irrelevant matter as to obscure the precise nature of the charge or defense, or materially increase the costs of the record."

We regard the above as a correct statement of the law.

Gage v. Roberts.

There is therefore no cause of complaint because a copy of the note is set out as a part of the petition.

The second question is more serious. There is no allegation in the petition that Gage made and delivered the note in question to Roberts, nor is it alleged that the sum claimed is due upon the note in controversy. Section 129 of the code provides that: "In an action, counter-claim or set-off, founded upon an account, promissory note, bill of exchange, or other instrument, for the unconditional payment of money only, it shall be sufficient for the party to give a copy of the account or instrument, with all credits and endorsements thereon, and to state that there is due to him *on such account or instrument*, from the adverse party, a specified sum, which he claims with interest."

The section above quoted requires the plaintiff to state in his petition "that there is due him on such account or instrument from the adverse party a specified sum which he claims with interest." This provision is entirely ignored in the petition in this case. Nor are there any facts stated therein from which the legal liability of Gage to Roberts for the sum claimed to be due, appears. This court will construe pleadings with great liberality, in order to sustain them if possible; but the failure to state material facts cannot be aided by construction. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

IN THE MATTER OF THE PETITION OF JOHN A. CREIGHTON,
ADMINISTRATOR OF THE ESTATE OF EDWARD CREIGHTON,
DECEASED, FOR THE DISTRIBUTION OF ASSETS OF SAID
INTESTATE REMAINING UNADMINISTERED.

Constitutional Law. Section 289 of the Chapter entitled Decedents, General Statutes, page 333, which authorized the district court to make distribution of estates, is not in conflict with section 16, Art. VI, of the constitution.

APPEAL from Douglas county. Tried below before
SAVAGE, J.

George W. Doane, for appellant.

J. M. Woolworth, for appellee.

MAXWELL, J.

This is a petition for distribution of the assets of the estate of Edward Creighton, deceased. It was filed in the district court of Douglas county, in October, 1878, and a decree of distribution was rendered as prayed. Mary McCrary, one of the heirs, appeals to this court.

It is alleged in the petition that: "On the 5th day of November, 1874, Edward Creighton, late of the city of Omaha, in said county, departed this life in said city, leaving him surviving Mary Lucretia, his wife, Alice McShane, and Mary McCrary, his sisters, Joseph Creighton and John A. Creighton, his brothers, Martha J. Creighton, Catherine Creighton, Mary Creighton, James H. Creighton, and John D. Creighton, his nephews and nieces. * * * That said intestate died seized of divers real and personal estates, and that said real estates descended to the said Mary Lucretia, his wife, for her life, and thereafter to his brothers, sisters, nephews and nieces, said brothers and sisters taking one-fifth part thereof, and the said nephews and nieces taking the

In re Creighton.

remaining fifth thereof; and the said personal estates descended to the said Mary Lucretia," etc. It is also alleged that Edward Creighton died intestate, and that John A. Creighton, the petitioner, was appointed administrator of his estate; that in January, 1876, Mary Lucretia died, leaving a will wherein she appointed John A. Creighton, James Creighton and Herman Kountze executors, and made divers legacies to said executors and among others to them as trustees for the use of Mary McCrary, during her life and at her death to her children, in equal shares. There is also an allegation that among the personal estate of Edward Creighton were certain mortgages which have been foreclosed, and at the sales the mortgaged premises were bought by the administrator for the estate. There are other allegations as to the condition of the estate and the accounts of the petitioners, to which we deem it unnecessary to call attention, as the only question urged in this court is one of jurisdiction.

The question turns upon the construction to be given to section 289, of chapter 17, of the Gen. Statutes, entitled "Decedents," which prior to the amendment of March 1st, 1881, [Comp. Stat., 247], read as follows: "After the payment of the debts, funeral charges, and the expenses of administration, and after the allowances made for the maintenance of the family of the deceased, and for the support of the children under seven years of age, and after the assignment to the widow of her dower, and of her share in the personal estate, or when sufficient effects shall be reserved in the hands of the executor or administrator, for the above purposes, the district court shall, by a decree for that purpose, assign the residue of the estate, if any, to such other persons as are by law entitled to the same."

The attorney for the appellant insists that section 16, of article VI, of the constitution, takes away the jurisdiction of the district court. The section reads as follows:

Lee v. Gregory.

"County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians and settlement of their accounts, in all matters relating to apprentices, and such other jurisdiction as shall be given by general law," etc. The words "settlement of estates of deceased persons" evidently refer to the adjustment of the claims and demands in favor or against an estate. They do not necessarily include the word "distribution" which is the act of dividing or making an apportionment.

As was said in the case of *Pleuler v. The State*, 11 Neb., 555, "A statute should not be declared invalid unless it is clearly forbidden by the paramount law." Can it be said that the authority to make settlement of the estates of deceased persons, carries with it the exclusive power to make distribution? We think not. This being the case, the legislature had authority to confer jurisdiction on the district court. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

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THOMAS H. LEE, PLAINTIFF IN ERROR, v. GREGORY & PERRY, DEFENDANTS IN ERROR.

Debtor and Creditor: MARSHALLING ASSETS. Only the creditor of a common debtor can compel a creditor having two or more liens, while the plaintiff has but one, to exhaust the fund not covered by the plaintiff's lien, before resorting to the other.

ERROR to the district court for Dodge county. Tried below, before Post, J. The facts appear in the opinion.

E. F. Gray, for plaintiff in error.

N. H. Bell, for defendant in error.

MAXWELL, J.

Lee v. Gregory.

On the 21st day of April, 1879, Thomas H. Lee, was the owner of a pair of mules, and on that day one Stephen D. Roblyer applied to him to exchange the same for a horse possessed by him. Lee informed him that if he would purchase a certain horse from Reynolds, Brown & Bro., and trade him both horses, he would give him the mules and \$25.00 in exchange. Roblyer then purchased the horse designated on credit for \$125.00, and the exchange was effected on the above conditions, but Reynolds, Brown & Bro., were unwilling to take Roblyer's note secured by a chattel mortgage on the mules for the value of the horse, and they induced Lee to sign the note as surety and also to sign a joint mortgage with Roblyer upon the mules, the horse purchased, and other property. Lee signed these papers under a promise from the mortgagees that they would resort to his property only in case that of Roblyer was insufficient to pay the note. The mules seem to have passed into the hands of one Thomas Laughrey, who on the 21st day of August, 1879, gave a mortgage on the same to Gregory and Perry, to secure the payment of the sum of \$125.00.

Roblyer failed to pay the note when it became due, and Lee, after that time went to Butler county, obtained possession of the mules and delivered them to Reynolds & Co., who thereupon promised him to accept them in full satisfaction and discharge him from all further liability on the note and mortgage. The mules at this time were worth about \$200.00. Soon afterwards Gregory & Perry applied to Reynolds & Co., and tendered the amount due on their note and mortgage, and demanded the mules and an assignment of the note and mortgage. Reynolds then informed them that he had accepted the mules in full satisfaction of the note and mortgage, and that Lee was released from all liability thereon. Gregory & Perry then paid Reynolds \$107.00, and received the mules together with Roblyer and Lee's note and mortgage, although no

Vance v. B. & M. R. R. Co.

having voluntarily relinquished it December 16th, 1870. On the 15th day of May, A. D. 1871, Alexander H. Vance made a homestead entry upon the same tract of land, and continued to reside thereon and made improvements. This entry was cancelled by the commissioner of the general land office May 13th, 1873, because of conflict with the grant of lands to the Burlington & Missouri River Railroad Company by act of congress, 1862 and 1864. The location of the road was made June 15th, 1865, and the odd numbered sections along the line were withdrawn from market on account of the grant, February 3rd, 1866. The road was duly constructed, and on the 28th of June, A. D. 1875, the company received a patent for lands from the United States government, including the above described tract. After the cancellation of his entry, and on the 2d of October, A. D. 1873, Vance entered into the contract of purchase with the company, which is referred to in the opinion. On the 11th of February, 1878, the commissioner of the general land office reversed the decision of May 13th, 1873, cancelling Vance's homestead entry, and he having duly made final proof, etc., received a patent for said tract of land, dated April 9th, 1879. This action was commenced October 9th, 1879, the plaintiff Vance praying for a decree declaring the patent to the railroad company to be null and void, etc., and that the title to said land was in the plaintiff, etc., and for other and further relief, etc. On a trial before Post, J., the court found in favor of the defendants, declaring the patent to Vance to be null and void, and adjudging the same to be in the defendant, etc., and that said defendant recover possession, etc. Vance appeals.

McKillip & Page, for appellant.

1. Title of defendant did not attach as against Bingham's entry. *Newell v. Sanger*, 2 Otto, 761. *U. S. v. B.*

& *M. R. R.*, 8 Otto, 389. *St. Joe & Denver R. R. v. Baldwin*, 7 Neb., 252. Patent was issued to plaintiff by virtue of act of congress, 19 U. S. Stat. at large, 85. The act is retrospective. Sedgwick on Statutes, 620. *Ritchfield v. Johnson*, 4 Dillon, 754. When an act of present grant does not locate the lands granted, whatever act under the grant does locate them by identifying the particular sections of land granted, from the time of that act the grant attaches and relates back to the date of passage of the granting law, as against the government; but as against intervening purchasers, or settlers under the homestead or pre-emption acts, the grant attaches or takes effect only from the time of the act done, which locates and identifies the particular sections or tracts granted. *M. K. & T. R. R. v. K. P.*, 7 Otto, 496. *Ryan v. R. R. Co.*, 9 Otto, 387.

2. Plaintiff is entitled to benefits of occupying claimant law. *Harrison v. Eastern*, 11 Ohio St., 347. *Shaler v. Magin*, 2 Ohio, 236. *Longworth v. Wolfington*, 6 Ohio, 10. *Davis v. Powell*, 13 Ohio, 321. *Litchfield v. Johnson*, 4 Dillon (C. C.), 557. *Chinn v. Darnett*, 4 McLean, 440. *Kram v. Mears*, 12 Kas., 335. *Iowa Railroad Co. v. Adkins*, 38 Iowa, 351.

T. M. Marquett and *J. W. Deweese*, for defendant, cited *Railroad Company v. Smith*, 9 Wall, 99. *Knevals v. Hyde*, 1 McCrary, 402. *A. T. & S. F. R. R. v. Rockwood*, 25 Kan., 292. *U. S. v. B. & M. R. R.*, 8 Otto, 384. On applicability of act of congress, 19 U. S. Statutes at large, 85, cited *Dash v. VanKleeck*, 7 Johns., 503. *Lytle v. Arkansas*, 9 How., 333. *Yosemite Valley Case* 15 Wall., 77. Vol. 4, Cong. Rec., 1st sess. 44th congress, 605—607.

LAKE, CH. J.

Whenever the question of right to land under the act of congress, through which the defendant company here

claims title, or others of similar import, has been considered by the supreme court of the United States, the holding in effect has been that the grant is of a present interest, and effective as against all adverse claimants immediately upon and from a precise designation thereof, which designation is accomplished either by a definite location of the line of the road upon the ground, or through a specific selection by numbers. And further, that where lateral limits are given within which the grant is to operate, as in that made to the Union Pacific Railroad Company, and in most of the others giving like aid, no specific selection by numbers is requisite, the definite location of the track being sufficient. *R. R. Co. v. Fremont County*, 9 Wall, 89. *Mis., Kan. & Texas Railway Co. v. Kansas & Pacific Railway Co.*, 7 Otto, 498. *United States v. B. & M. R. R. Co.*, 8 Id., 394. *Ryan v. R. R. Co.*, 9 Id., 382.

The reason for the rule that no specific designation by numbers is necessary, and that the mere location of the line of the road upon the ground will suffice in those cases where definite lateral bounds are set to the grant evidently is that, inasmuch as all of the lands, or rather all of the odd numbered sections within the designated limits, even if none have been previously disposed of, are required to satisfy the donation, there is no want of certainty as to what the grant was intended to cover. It would be difficult indeed, if not impossible, to devise a more certain and unmistakable designation of lands than one which, in general terms, mentions all of the odd numbered sections on both sides and within a specified distance from the center line of a road.

As construed in the case of the *United States v. B. & M. R. R. Co.*, *supra*, the grant in question is without definite lateral limits. No particular selection of the land in controversy by numbers was made by the company, at least not until it was entered as a homestead by the

plaintiff in May, 1871. The location of the company's road was definitely fixed on the 15th day of June, 1865. Therefore, conformably with the decisions made in the cases cited above, if the grant of the ten alternate sections per mile had been in terms limited to the distance of twenty miles on each side of the track—the land in controversy being within that distance—no doubt whatever could be entertained that the right of the company definitely attached to it immediately upon such location, thus antedating the plaintiff's claim by nearly six years.

The case of the *United States v. B. & M. R. R., Co.*, *supra*, concerned the title of lands selected by this defendant to supply a deficiency claimed to exist in the lands described in the grant, within twenty miles of the road, in consequence of sales made by the government prior to its definite location. As to these deficiency lands, it is doubtless true that no right attached in favor of the company until definite selections by numbers were made, there being no other available means of designating them, or knowing that they were claimed under the grant. But, as to any of the lands lying within twenty miles of the center line of the road, no such necessity existed. By the terms of the grant, "every alternate section of public land (excepting mineral lands as provided in this act,) designated by odd numbers, to the amount of ten alternate sections per mile, on each side of the road, and the line thereof," etc., is given.

By this language it must have been intended, if not actually to restrict the grant within the distance of twenty contiguous sections, or miles, on each side of the line of the road, at least that the lands be taken as near that line as possible. It certainly could not have been the intention of congress that available lands within the distance of twenty miles might be refused, and their place filled by selections from the body of public lands beyond

that distance. If this be so, then, as all of the lands within the distance of twenty sections, at least, were required to make up the quantity to which the company was entitled, does it not follow that, to this extent, the designation was just as certain upon the location of the road as it would have been by an express limitation, in the most positive terms, to that distance? It seems to us that it was. Therefore, as to all of the odd numbered sections within twenty miles of the line of the road, we see no reason for a rule different from that which governs in those cases where express lateral limits are given. There is equal certainty, and the principles involved seem to be the same in both cases.

For these reasons we conclude that the defendant's title through its patent from the United States is good; and, having its inception, by relation, on the 15th day of June, 1865, when the line of the road was definitely fixed, it necessarily follows that the patent issued to the plaintiff, in virtue of his settlement in May, 1871, is void, and confers no right whatever to the land. The previous settlement made by Samuel G. Bingamon in October, 1865, under the homestead law, has no bearing whatever on the case. This settlement also was subsequent to the time when the defendant's right attached, and did not affect it.

One other question remains to be considered. It is whether the plaintiff is entitled to the benefit of the "act for the relief of occupying claimants." Comp. Stat., Chap. 63.

It appears that on the 2nd day of October, 1873, after a decision adversely to him by the land department, the plaintiff applied for and took a contract in writing from the defendant for the sale to him of the land in controversy, on a 10 years credit, and paid one years interest on the agreed consideration in advance. This and the interest for the two succeeding years, in all the sum of \$259.45, was all

that he paid on the contract; as to all other payments and requirements therein provided for he refused further performance. The particular terms of this contract, save the conditions of forfeiture, are not essential to the present inquiry and need not be mentioned.

The conditions of forfeiture were, in substance, that if Vance failed to make the agreed payments, or any of them, punctually, or to pay the taxes assessed against the land as they became due, or, in fact, to perform any of the other agreements and stipulations by him to be performed, then the contract, to the extent that it bound the company, was to become "null and void," and all rights and interests thereby created in favor of Vance were to "utterly cease and determine, and the right of possession, and all equitable and legal interests in the premises," should revert to the company, "without any declaration of forfeiture or act of re-entry, or any other act of the" company "to be performed;" and without any right "of reclamation or compensation for moneys paid, or services performed, as absolutely, fully and perfectly as if this contract had never been made. And said party of the first part," the company, "shall have the right, immediately upon the failure of the party of the second part," Vance, "to comply with the stipulations of this contract, to enter upon the land aforesaid, and take immediate possession thereof, together with the improvements and appurtenances thereto belonging." And Vance further agreed that thereupon he would "surrender unto the said party of the first part the said land and appurtenances," and that no court should relieve him from the effects of "a failure to comply strictly with this contract." In short, the contract is one wherein the rights of the respective parties are set out with great particularity, and the privilege of the company to declare a forfeiture against the grantee for the non-performance of

Vance v. B. & M. E. R. Co.

certain conditions, is as clearly expressed as is possible. There is no pretense that the contract is at all affected by either fraud or mistake in the making of it, and the only ground upon which the appellant seeks to break the full force of its provisions is that, as he alleges in his petition, there was an accompanying oral agreement, made by the company to the effect that, "said written contract should not estop, prevent, or interfere with plaintiff," (Vance,) "to further prosecute his claim to said land under his said homestead entry thereof, but that said plaintiff should be free to prosecute the same as fully in all respects as though said written contract to purchase said land had not been made by said plaintiff;" and that if Vance finally succeeded in obtaining a reversal of the decision against him, "either by the commissioner or in the courts, the said defendant agreed to repay to plaintiff all moneys, with interest from the time of payment, then or thereafter paid by him on said contract," * * * and "that said written contract should, on obtaining such reversal of the land commissioner's decision, be no longer in force, but should then be deemed rescinded and void."

In the answer of the defendant all of these allegations, respecting this oral agreement, are denied, and the judgment of the district court is that it was not made. And the finding upon this point is clearly supported by the evidence, as we think.

To support his averments respecting such agreement, Vance himself testified in substance that at the time of his purchase of the land he "went into the railroad land office, and Mr. McFarland," who acted for the company as its agent, "was alone; it was about dinner time. I acknowledged frankly to McFarland that I was beat on the appeal by the secretary of the interior's decision, but I told him at the time that I had full faith in the government, that the decision would be reversed, and asked

him providing I paid him money in order to secure the land, whether in case of a reversal of this decision I could recover the money I paid them; he told me most certainly I could, the company was honorable, and they would refund the money in case I procured a reversal of the decision. On the strength of that I purchased the land."

Vance further testified that: "When I received notice of my re-instatement, I called on McFarland and refreshed his memory in regard to the promise made to me; he told me this: 'You entered into the contract and I will refund you your principal.' I objected to that, and told him there was interest coming to me. I thought there was interest coming to me on this money lying in their office. We split on that. He told me, 'Any time you fetch in your contract and surrender it I will refund you your principal.' At the time the contract was made that was the understanding. I was to surrender the contract in case of reversal, that was my understanding."

Opposed to this there is the testimony of McFarland, who says: "Mr. Vance's recollection of that conversation and my own are different. Mr. Vance came as he states, and said his homestead entry had been finally cancelled, as I already knew. He was anxious to secure the land in some way, and we were quite willing he should have the first opportunity to buy it. We agreed upon the price, on ten years credit, nine dollars per acre, and he paid one payment of interest. He asked me the question, as I now remember, in case we failed to secure the title—in case the company failed to secure title to the land—would we refund the money he was then paying. I told him it certainly would. That is the substance of the conversation, as I now remember it. I don't think there was any talk at all about prosecuting his claim any further before the department. He may have had such an intention, but I don't think he mentioned it there."

And in answer to the question "whether there was any promise made to refund to him in case he got a patent to the land," this witness further testified: "No sir, there was not. I told him if we failed to give title, couldn't give title to him, we would refund the money, and save any controversy on that point."

And on his cross examination in answer to the question, "did you ever offer to pay this money back to Mr. Vance?" he said, "No sir, never did, except in one respect. Mr. Vance came into our office at one time, I don't remember what date it was, it was when he had got title to his land, and he asked his money back. I told him he was not entitled to any money under the arrangement made with me. I did not look at his account. I presumed he had paid some of the principal on the contract. I said to him if he did not want to carry out the contract, if he wanted to stand on his homestead entry, to bring in his contract and we would pay him back any principal he had paid. He brought the contract in at a subsequent date; at that time I looked up his account and found he had paid no principal at all, and I refused to pay him any principal." * * * "I told him if he thought his title better than ours to bring in his contract, and we would pay him back any principal he had paid."

From the foregoing, which is the substance of all the evidence there is on the subject, it must be apparent that the allegations of the petition as to the oral agreement are not proved. And, as before stated, so the trial court found; the finding being expressed in these words: "And the court do further find, in response to plaintiff's request, that, as matter of fact, at the time of the making of the land contract between the defendant company and the plaintiff, it was agreed by the said company, by J. D. McFarland, its duly constituted agent, that in case the said company failed to perfect its title to the said land, the said company would claim no right under said con-

tract against the said plaintiff, and that said agreement was a verbal one, and was not included in the written contract of purchase. And the court do further find that said defendant company did not fail to perfect its title to said land, but on the contrary has fully perfected the same." And the consideration of the court consequently was that, as to Vance, the written contract, with all of its provisions respecting the payment of the purchase money, taxes, etc., and as to forfeitures for non-payment at the option of the company, remained in full force. Such being the adjudged relation of Vance to the railroad company respecting this land, is he in an attitude which entitles him, upon eviction for forfeiture, to relief as an occupying claimant?

The cases in which such relief may be afforded are all mentioned in the first section of the act, and are as follows: *First*. "When any occupying claimant, being in quiet possession of any lands, or tenements, for which such person can show a plain and connected title, in law or equity, derived from the records of some public office;" *Second*. "Or being in quiet possession of, and holding the same by deed, devise, descent, contract, bond or agreement, from and under any person claiming title as aforesaid derived from the records of some public office, or by deed duly authenticated and recorded;" *Third*. "Or by being in quiet possession of, and holding the same under sale on execution against any person claiming title as aforesaid, derived from the records of some public office, or by deed duly authenticated and recorded;" *Fourth*. "Or being in possession of, and holding any land under any sale for taxes authorized by the laws of this state, or the laws of the territory of Nebraska;" *Fifth*. "Or any person in quiet possession of any land, claiming title thereto, and holding the same in good faith under a deed of sale made by executors, administrators, or guardians, or by any other person or persons, in pursuance of any

order of court, or decree in chancery, where lands are, or have been directed to be sold, and the purchaser or purchasers thereof have obtained the title thereto, and possession of the same, without any fraud or collusion on his, her, or their part." Any person falling within the description of either one of these five classes, the law declares, "shall not be evicted, or turned out of possession by any person, or persons, who shall set up and prove an adverse and better title to said lands, until said occupying claimant, his, her, or their heirs, shall be fully paid the value of all lasting and valuable improvements made on such land by the occupying claimant," etc. [Comp. Stat., Chap. 63.]

Now is it not obvious that the plaintiff, according to the evidence and finding of the district court, belongs to neither of these classes? Having deliberately, and without fraudulent inducement, or mistake of facts, entered into this contract with the railroad company, the actual owner of the legal title, for the purchase of the land, is he in a situation to say, that the title is "adverse" to him? Is he not effectually estopped from so claiming? By the plain letter of the statute it is only when the occupying claimant's possession is overthrown "*by an adverse and better title*" than his own, that it affords him any relief. Surely, a title which he has so far recognized as to purchase for his own protection, and under which he holds possession of the land, can in no sense be properly said to be adverse to him. To hold it to be so would, as we think, be equivalent to saying, that provisions for forfeiture for non-payment, etc., in contracts for the sale of land, although made with all fairness, and in the utmost good faith, shall be enforced only at the option of the purchaser. That so startling an effect was ever intended for this law by its framers we cannot believe.

It is true that in its provisions it is eminently humane and should be liberally construed. It should be admin-

istered in the same spirit that prompted the legislature to its enactment. But, notwithstanding all this, the courts have no right to extend its operation to cases not falling fairly within its terms. The intention of the law-makers evidently was that in the specified cases, it might be resorted to as a shield against the enforcement of strictly legal, but in one sense inequitable demands, based upon adverse and superior titles, but never as a weapon of offense, by one party to a contract, to strike down and destroy rights of the other, which, for a sufficient consideration, he had solemnly undertaken to respect.

Such being our views upon this branch of the case, we must hold that, sustaining the relation of vendee to the defendant, the plaintiff is not entitled to relief as an occupying claimant, and the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

MAXWELL, J., dissenting.

There is but little dispute as to the facts in this case, and the principal questions involved are purely questions of law. The supreme court of the United States seems to have given a construction to the act granting lands to the defendant as to the time when it had so far complied with the act of Congress as to withdraw the lands in dispute from private entry, homestead and preemption. And as that court is the final arbiter in construing a statute of the United States, we must accept its decision thereon as final. It would seem, however, to be nothing but justice, to grant settlers taking homesteads on such lands before they are withdrawn from market, a right to enter the same, and either compensate the company in money, or allow it to select other lands in lieu of those thus taken. There is gross injustice in the government inviting settlers to enter these lands at the several land offices, and to receive the money of such settlers for the costs of sur-

veying and land-office fees, when in fact the government will not protect them in their purchases. And the wrong does not stop there. A party who is permitted to enter such lands as a homestead, or preemption, makes his home on the land thus entered, breaks up and opens a farm and makes other valuable improvements thereon, only to find after years of self-denial and toil, that the land was not subject to entry, and that he is not the owner, while in the mean time all the available public land within reach has been entered. All these wrongs could be prevented, if the government in a case like that under consideration, would promptly withdraw its lands from market, or protect those settling thereon prior to their withdrawal. It is no answer to say that the law was notice to every one of the nature of the grant, and that the purchaser took a preemption or homestead on the odd-numbered sections of such lands at his peril, because until the location of the line, all of these lands were subject to homestead and preemption, and the grant did not attach to any particular tract. And certainly a party who was permitted to enter lands as a homestead, within the limits of the grant, might reasonably be supposed to have entered the same in good faith, and to be entitled to compensation for his improvements in case of eviction.

Occupying claimants, who have made valuable and lasting improvements on real estate, and have thereafter been evicted therefrom, have been allowed to recover for their improvements in Ohio ever since the case of *Lessee of Shaler v. Magin*, 2 Ohio, 296, where an entry had been made on the lands in dispute prior to 1818, under which the defendant took possession and made the improvements in question. In October, 1818, after the improvements had been made, the entry was withdrawn, and about the same time another entry was made on the land by one Ellis, under whom the defendant claimed.

It was held, that as the claimant had an equitable title of record, he was entitled to pay for his improvements made before his title commenced. The question was again before that court in the case of *Longworth v. Worthington*, 6 Id., 9, where it was held, that a purchaser of real estate at administrators' sale, if evicted by the heirs, was entitled to the benefit of the occupying claimant law. In the case of *The Lessee of Davis v. Powell*, 13 Ohio, 308, it was held, that a defendant holding possession of premises under claim of title, will be allowed under the occupying claimant law, as well for improvements made by him before his title commenced, as for those made afterwards. The court say: (page 320,) "The equity of the statute embraces all improvements made in the honest belief of ownership, if, at the time of the rendition of judgment, the occupant is in possession under such title as brings him within the meaning of the statute. If such a state of facts exist, as to call the statute into action, it never stops until it has worked out complete equity and justice, and embraced the entire improvements beneficial to the successful claimant, and honestly made. Any other construction would permit an honest purchaser of land, buying from one, without color of title, who sells from mistaken belief of ownership, to be swept out of the hard toil of years, expended in improvements made for the provision of his family or the repose of age. The statute is to be so construed, whenever a case comes within its letter, that the person receiving the benefits and advantages of improvements, shall make compensation. It rests on the broadest equity, and in the language of the court in *Longworth v. Worthington*, 6 Ohio, 10, may justly claim a liberal construction."

In *Harrison v. Castner*, 11 Ohio State, 389, the doctrine of the cases above cited was approved.

In the case of *Doe, ex dem., C. Chim, v. Darrell*, 4 McLean, 440, the defendants patent for lands in the

Virginia military district, was dated April 14, 1806, his entry was made November 16th, 1798, and the survey was executed April 2nd, 1799. The lessor of the plaintiff claimed under a patent dated January 30th, 1827, the entry being made in July, 1819, and the survey in 1821. It was held that the defendant was entitled to compensation for his improvements.

In *Litchfield v. Johnson*, 4 Dillon, 551, it was held, that settlers on what were known as the Des Moines river lands in Iowa, were entitled to the benefits given by the statute, when they had made valuable improvements on lands, of which they were afterwards adjudged not to be the rightful owners.

In the case of *Stebbins v. Guthrie*, 4 Kas., 354, the supreme court of Kansas approved of the decisions above cited from Ohio. The question was again before the supreme court of Kansas in the case of *Krause v. Means*, 12 Kas., 335, and it was held that one who is in quiet possession of land, and holding the same by bond from, and under any person claiming title by deed, duly authenticated and recorded, is entitled to the benefits of the occupying claimant law.

In *Lemart v. Barnes*, 18 Id., 9, the land in controversy was originally a part of the Osage Indian reserve, but afterwards, under the provisions of article 14, of the Osage Indian treaty of September 29th, 1855, was allotted to a certain half-breed Osage Indian. In August, 1867, the occupying claimant obtained his title to said land from the half-breed Indian and paid him therefor \$350.00. The occupying claimant then took possession of said land and remained in possession until evicted. In February, 1872, the successful party procured his title to the land in dispute from the half-breed Indian. It was held that the claimant was entitled to compensation for his improvements. Other cases could be cited, sustaining the proposition that an

occupying claimant is entitled to full compensation for his improvements. The rule rests upon the plainest principles of justice. If A. has made valuable and lasting improvements upon lands that are afterwards adjudged to be the lands of B., is it not just that B. should pay for such improvements?

The improvements upon such lands not unfrequently are of greater value than the land itself, and have absorbed in their construction the accumulations of many years of toil and self-denial. Even where the occupying claimant is fully compensated for his improvements—and he should be fully compensated in all cases—he, in many, if not most cases, will sustain heavy loss. In the case at bar two patents were issued by the United States, one to the plaintiff and one to the defendant. This is a contest between these patents. They cannot both be valid. In order to determine the validity of either, we must recur to the date of filing the plat locating the line of road of the defendant, which being prior in point of time to the homestead entry, and there being no proof that land in lieu of that occupied by the plaintiff has been entered by the defendant, the right to the land must be held to be in the defendant. But the plaintiff evidently made his improvements on the land in good faith. These improvements materially enhance the value of the land, and justice requires that the plaintiff should be paid for this enhanced value. This law should be given no narrow, technical construction, but should be administered in the broad principles of justice, in which it had its origin. The contract from the defendant to the plaintiff does not seem to enter into this question. The plaintiff claims nothing under it. It was taken after the improvements, or a considerable portion of them, were made, and whether the plaintiff notified Mr. McFarland that he intended to continue his contest or not, is not material in the case. The plaintiff's right

Vance v. B. & M. R. R. Co.

to compensation is denied upon the ground that he is the vendee of the defendant, and therefore is estopped by his contract. If this is true, does the fact that he received the contract prevent his ignoring it, and claiming under a superior title, namely, a patent from the United States? The patent is not void upon its face, and if void at all, is so because the rights of the defendant attached to the land before that of the plaintiff. The plaintiff settled upon this land as a homestead, made the necessary improvements to comply with the law, has occupied the premises for a much longer period than five years, and entered the same as a homestead, and has thereby exhausted his right of homestead under the laws of the United States. A homestead entry certainly comes within the plain provisions of the statute. If this entry was valid, the plaintiff would take the legal title by his patent, and the contract would be mere waste paper. The title of the plaintiff therefore is clearly adverse to that of the defendant.

It must not be forgotten, however, that the defendant takes by *grant*, and not by purchase, and that when the quantity granted has been received it can take no more.

Sec. 19 of the act granting lands to the defendant, provides: "That for the purpose of aiding in the construction of said road, there be, and hereby is, granted to the said Burlington & Missouri River Railroad Company, every alternate section of public land (excepting mineral lands as provided in this act) designated by odd numbers, to the amount of ten alternate sections per mile on each side of said road, on the line thereof, and not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached at the time the line of said road is definitely fixed; *Provided*, That said company shall accept this grant within one year from the passage of this act, by filing such acceptance with the secretary of the interior,

and shall also establish the line of said road, and file a map thereof with the secretary of the interior within one year of the date of said acceptance, when the said secretary shall withdraw the lands embraced in this grant from market."

The grant is of ten alternate sections per mile on each side of said road, on the line thereof and not sold, reserved, or otherwise disposed of * * * and to which a preemption or homestead claim may not have attached, etc. The sections designated by odd numbers for twenty miles on each side of the road, which were not within the exceptions named, were set apart to the defendant, and the deficiency to be supplied by lands to be entered outside of this limit. Now, suppose the proof showed that the defendant, from a desire to favor parties, who, like the plaintiff, had settled upon lands taken under the homestead act, prior to February 20th, 1866, when the lands in dispute were withdrawn from market, had selected a sufficient quantity of lands on the same side of the defendant's road, as the land in dispute is situated, equal to ten sections per mile, and thus satisfy the grant on that side, the plaintiffs patent would prevail over that of the defendant; because, being a grant by quantity, and the designation of the odd numbered sections merely a mode of selecting the land, the defendant could not, after receiving the quantity of land granted to it, claim lands within the twenty mile limit for which other tracts have been selected in lieu thereof. And the fact that lieu lands had been selected would *prima facie* at least be an abandonment of all lands for which such selections had been made. The defendant has constructed its railroad in good faith, and has fully complied with the act of congress making the grant, and is entitled to receive all the benefits to be derived therefrom, and is entitled to receive in the aggregate ten sections of land per mile, on each side of the line of the road, and as the proof fails to show

that it possesses that quantity on the side of the road on which the land in dispute is situated, I concur in the affirmation of the judgment in ejectment, but think the plaintiff is entitled to payment for his improvements.

T. APPLEGET, ADMINISTRATOR, ETC., PLAINTIFF IN ERROR,
v. MARY R. GREENE, DEFENDANT IN ERROR.

HOMESTEAD: DEATH OF HUSBAND: PURCHASE OF OUTSTANDING NOTES BY WIFE. One G., executed certain promissory notes secured by mortgage on his homestead, and soon thereafter died. His widow then purchased the notes with her own funds, took an assignment thereof and filed them as claims against the estate. *Held*, that in no event in the absence of a showing that the estate was insolvent, would she be compelled to resort to the mortgaged property for the payment of the same.

ERROR to the district court for Johnson county. **Heard** below, before WEAVER, J. The opinion states the case.

T. Appleget & Son, for plaintiff in error.

Davidson & Easterday, for defendant in error.

MAXWELL, J.

In May, 1880, the plaintiff was appointed administrator of the estate of John A. Greene, deceased, by the county court of Johnson county. In November of that year, the defendant, who is the widow of John A. Greene, deceased, filed as claims against his estate, three promissory notes executed by John A. Greene to James Neolis, or order, which notes amounted to the sum of \$750.00 and interest, and were secured by mortgage on the homestead of the decedent. These notes and the mortgage seem to have been purchased by the defendant with her own funds and an assignment taken to herself. No question is raised as

to the good faith of the transaction. While the claim was pending in the county court, R. L. McDonald & Co. filed a motion, supported by affidavit, to require said defendant to subject the mortgaged property to the payment of the notes, before sharing in the general assets of the estate. The notes were allowed by the county court as a claim against the estate, and the defendant was required to exhaust the mortgaged property before sharing in the general assets. From this order the defendant took the case on error to the district court, where the order of the county court, so far as it required the defendant to sell the mortgaged property, and apply the proceeds to the payment of her claim, was reversed. The administrator brings the cause into this court by petition in error.

It may perhaps be questioned whether the administrator has such an interest in the payment of the claim as to authorize him to prosecute a petition in error, but we do not place our decision on that ground. There is no statement of facts in the affidavit of R. L. McDonald & Co., from which it appears that the estate is insolvent. There is no statement showing the value of the personal assets belonging to the estate, nor the amount of the debts and claims against the same. There is a statement in the motion of McDonald & Co., that the estate is insolvent, but there is not a particle of proof to sustain it. The notes were a legal charge against the estate, and so far as the record discloses, there was no error in requiring their payment out of the personal assets. But even if the district court had erred in its judgment, McDonald & Co. do not complain of such ruling. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

12 306
41 859CHARLES H. DEWEY & EMERSON L. STONE, AND OTHERS,
APPELLEES, v. JOHN H. LEWIS, AND OTHERS, APPELLANTS.

Practice: APPEAL. Appellants filed their answer out of time. On the 3rd day of May, 1880, and while the said answer was on file, the court defaulted them as for the want of an answer. On the 22nd day of June following, the said defaulted defendants filed their motion to set aside their said default, and for leave to refile their answer *nunc pro tunc*, together with three affidavits in support of said motion. It does not appear that this motion was ever brought to the attention of the court, nor that any ruling was ever had thereon. On the 11th day of December, 1880, on motion of the attorneys of the plaintiffs, the answer of the said defendants was ordered stricken from the files. On the 23rd day of the same month, appellants were called in open court, and failing to answer were again defaulted, and thereupon a trial was had to the court between plaintiffs and other defendants who had answered, and a final decree rendered. There was no bill of exceptions. Upon appeal, *held*, that there was no case presented for the action of this court, and that the appeal must be dismissed.

APPEAL from the district court for Adams county. Tried below before GASLIN, J. The facts, sufficient to an understanding of the point decided here, appear in the opinion.

T. D. Scofield, for appellants.

James Laird and *B. F. Smith*, for appellees, Dewey & Stone.

COBB, J.

The appellants were not original parties to the suit, but were made parties on their own application, by order of the court below. On the 13th day of December, 1879, and in and by the same order, the court granted leave to the plaintiffs to amend their petition and to file their amended petition within forty days from the date of said

Dewey & Stone v. Lewis.

order, and allowed the defendants sixty days in which to file their answer. On the 15th day of January, 1880, the plaintiffs filed their amended petition. On the 15th day of March following the appellants filed their answer in the cause. On the 3rd day of May next ensuing, the following journal entry was made: " * * * thereupon this cause come on further to be heard upon the motion of the plaintiff to enter a default against the defendants, J. H. Lewis & Co. and Lewis & Cogan, whereupon said defendants, and each of them, are three times severally called in open court, but come not, thereby making default. * * * It is therefore considered and adjudged by the court here that default be, and the same is, hereby entered of record against the said defendants."

On the 3rd day of December, 1880, the plaintiffs, appellees, filed their motion to strike the answer of the appellants from the files, for the reason that the said answer was filed out of time. On the 11th day of December, the said motion was sustained by the court, and the said answer stricken from the files, and on the 23rd day of the same month the appellants were regularly defaulted for the want of an answer, a trial had to the court between the plaintiffs and answering defendants, and a final decree rendered and entered.

It further appears that on the 22nd day of June, 1880, the appellants filed in the said court a motion to set aside the order of default entered against them in said cause "for the want of an answer on the 3rd day of May last, at the last term of this court," which said motion was based upon, and accompanied by, three several affidavits of the attorney of the appellants. Now, it not only does not appear that this motion was ever brought to the attention of the court, but it appears affirmatively from the certificate of the clerk that the same never was acted upon by the court. The record not being put together with any regard to order or sequence, it is

difficult to tell whether it is all here that the appellants desired to bring up, while it is evident that there is a good deal that need not have been brought. So it seems that the appellants, not being original parties to the suit, applied to and sought the discretionary favor of the court, to allow them to answer and become parties defendant. This the court granted, and in the order granting it, required them so to answer within a limited time. For some cause they failed to answer within the time thus limited, but placed an answer on file beyond and out of time. On the 3rd day of May, 1880, and while the said answer, though filed out of time, was actually on file, the court entered the default of the said appellants for the want of an answer. So the case stood for more than seven months without another step being taken by the plaintiffs, when, probably, discovering that an error had been committed in defaulting the said defendants, when their answer was actually on file, they moved the court to strike the answer from the files, which was done, and the said defendants were called and regularly defaulted, and on the same day a final decree in the cause entered, from which the appellants appeal to this court. There is no bill of exceptions, and so this court cannot enquire into the merits of the decree. It is apparent that by some means the appellants have been deprived of a hearing. Whose fault this is, is not so apparent. Appellants claim in their brief, that their motion of June 22nd was brought to the attention of the court, that it took the same under advisement, but never decided the same; but they have failed to bring up any record of this. Were this shown by the record, it would probably be considered error in the district court to have rendered a final decree in the case, without first disposing of the motion. But the district court will be presumed to be willing to do justice between any of its suitors. Also to be

ready and willing to make its own records complete and consistent. Upon this principle it must be presumed either that the attention of the court never was called to the motion and affidavits of the appellants, or that having been called thereto, the proper order was made, and that by accident or oversight on the part of the clerk, such order was not recorded. In either case the district court is the proper tribunal to which application should be made for redress. If, upon timely and proper application, such court should refuse or fail to take action in the premises, this court possesses the power to compel it to take such action as would either grant the proper relief or enable this court to take jurisdiction of the matter on appeal or error. But until there has been erroneous action, or a failure to act, on the part of the trial court, upon proper motion by the complaining party, this court has nothing upon which to act.

It therefore necessarily follows that the appeal must be dismissed.

APPEAL DISMISSED.

HORACE B. SMITH AND WILLIAM H. SMITH, PLAINTIFFS
IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN
ERROR.

1. Criminal Law: RECOGNIZANCE. H. B. S., as principal, with W. H. S. and E. S., as sureties, entered into a recognizance before an examining court, conditioned "that the said H. B. S., shall be and appear at said March term of said district court, on the first day thereof, and not depart said court without leave, and shall abide the order of said court," etc. The said H. B. S. appeared at said court on the first day thereof, and was indicted for the crime for which he was bound over. Thereupon the district attorney procured a warrant in due form for his arrest to answer to said indictment, and placed the same in the hands of

Smith v. The State.

the sheriff, who arrested H. B. S. thereon. Thereupon, almost immediately, the said H. B. S. applied to the court to be discharged from arrest, on the ground that he was under bond, etc. Thereupon the court ordered his discharge, and notified the sheriff that such arrest was illegal, etc. The securities, W. H. S. and E. S., were present, and made no objection to the discharge. Upon the case being reached for trial, and the said H. B. S. called, he did not answer and was defaulted. *Held*, that the securities were discharged from liability.

2. ———: ———. Action on a recognizance against H. B. S., as principal, and W. H. S. and E. S., as sureties. Summons served on W. H. S. and E. S., but no service on, or appearance by, H. B. S. Judgment against H. B. S. and W. H. S., no judgment either for or against E. S., *held*, erroneous.

ERROR to the district court for Sarpy county. Tried below, before SAVAGE, J. The opinion states the case.

John M. Thurston, E. F. Smythe, and John Q. Goss, for plaintiffs in error, cited Wharton Crim. Law, sec. 2976. Bacon's Abr., Title "Bail." *Commonwealth v. Coleman*, 2 Met., (Ky.) 382. *The State v. Holmes*, 23 Iowa, 458. *State v. Newton*, 22 Wis., 536.

C. J. Dilworth, Attorney General, for the state.

This case does not come within the rule contended for by the plaintiff in error. The arrest was clearly an oversight which was corrected by the court upon the request of the said Horace B. Smith in the presence of the plaintiff in error, and upon the ground that the accused *was under bond*; and when we take into consideration the fact that the plaintiff in error is the father of the accused, and was present when the accused was claiming to the court that he was under bond, and held thereby as a reason why he should be released from arrest, it is not going too far to presume that the said application was made with the express consent of the father, and he should not be permitted to take advantage of it now.

COBB, J.

This action was brought on a bond or recognizance entered into before the county judge of Sarpy county, by Horace B. Smith, William H. Smith and Emeline F. Smith, in the penal sum of eight hundred dollars, for the appearance of the former at the then next ensuing district court, etc., to answer to an indictment for grand larceny and not depart the court without leave, etc.

It appears from the findings of fact by the court, to whom the cause was tried without a jury, that said defendant, Horace B. Smith, appeared on the first day of said term of the district court; that an indictment was by the grand jury duly returned against him for grand larceny; that upon the presentment of said indictment by said grand jury, the clerk of the court issued under the seal of the court a warrant for the arrest of the said defendant, upon the charge made in the said indictment, and delivered the same to the sheriff of Sarpy county, who, by virtue thereof, arrested said defendant; that said warrant was issued at the request of the district attorney, but without any order, direction, or knowledge of the court; that immediately upon being arrested, and within five minutes thereafter, the defendant personally and by counsel appeared before the court and claimed that said arrest was illegal and unauthorized, inasmuch as his bond was still in force and operative, which position the court sustained and directed the sheriff to discharge him, etc.; that such arrest and discharge were known to the sureties upon the recognizance, and such discharge was not objected to by them; that after the release of said defendant from said arrest he failed to appear when duly called in court, and did not answer to the charge, etc., and that the said bond was duly forfeited, etc.

It was quite competent for the district attorney to cause the warrant to issue for the arrest of Horace B. Smith, upon his being indicted. It was his duty to do so, if in his opinion the bond was insufficient in amount, or the

securities thereto sufficient to secure his continued attendance to take his trial and submit to the judgment of the court, and he will be presumed to have acted on such opinion in issuing the warrant and placing it in the hands of the sheriff. Upon this second arrest of the prisoner it was competent for the court to have admitted him to bail for his appearance from day to day, in such sum and with such sureties as the court should deem sufficient, but no act of the court could give new life to the bond in question. When by virtue of a warrant lawfully issued upon an indictment for the identical offense for which he was held to answer, the sheriff had by his arrest taken the prisoner out of the custody of his sureties, "his jailors of his own choosing," nothing short of a new bond lawfully executed by them, would restore him thereto.

There is another view which might be taken of this case, leading to the same result. The bond or recognizance was signed by Horace B. Smith, (the principal) and William H. Smith and Emeline Smith, (sureties). The suit is against them all. The summons was served on William H. Smith and Emeline Smith, but was returned as to the said Horace B. Smith not served, for the reason that he was not found in Sarpy county. The said William H. and Emeline Smith appeared by counsel, the said Horace B. Smith did not answer or appear. The judgment of the court is against *Horace B. Smith*, and William H. Smith, and no judgment either for or against Emeline Smith, nor any reason given why she is thus dropped out of the case. Certainly the judgment cannot stand as against Horace B. Smith, who was not served and made no appearance in the case. As to William H. and Emeline Smith, they were joint securities, and while it is not necessary here to say, and we expressly reserve that point, that they must be jointly held upon it, if held at all, yet we do say, that their original liability on the bond being a joint one, and they having been jointly sued

The State v. Wise.

and having jointly defended, a judgment against one of them, which takes no notice whatever of the other, is erroneous.

But, as we have seen, by reason of the lawful arrest of the principal on a warrant issued upon the indictment, to which he was recognized to answer, the sureties were discharged. The judgment must be reversed and the cause dismissed.

JUDGMENT ACCORDINGLY.

12	313
18	525

THE STATE OF NEBRASKA, EX REL. CLARENCE A. NEWMAN,
v. JOHN WISE, CHAIRMAN OF THE BOARD OF COMMISSION-
ERS OF PLATTE COUNTY, AND JOHN STAUFFER, CLERK.

Tax for Bridge Fund. A tax levied for "a county bridge fund," although not based upon a previous estimate as directed in the first clause of the *sixth* sub-division of section 25 of the act "concerning counties and county officers," approved March 1st, 1879, Comp. Stat., 179, is valid, and constitutes a legal basis for a warrant drawn upon the county treasury for an expenditure for bridge purposes.

ORIGINAL application for mandamus.

B. Millett, for relator.

W. S. Geer and *M. K. Turner*, for respondents.

LAKE, CH. J.

This is an application for a peremptory writ of mandamus to compel the defendants to execute and deliver to the relator a county warrant for the sum of four dollars and twenty-five cents, being the amount of an account for nails furnished by him to the county of Platte for the repair of its bridges, and duly audited and allowed by the board of county commissioners.

Our decision upon the application requires a construction of the following provision in section 25 of the act "concerning counties and county officers," approved March 1st, 1879, viz: "It shall be the duty of the county board of each county, * * * * * *Sixth*, At their regular meeting in January of each year to prepare an estimate of the necessary expenses of the county during the ensuing year, the total of which shall in no instance exceed the amount of taxes authorized by law to be levied during that year, including the amounts necessary to meet outstanding indebtedness as evidenced by bonds, coupons, or warrants legally issued; and such estimate containing the items constituting the amounts shall be entered at large upon their records and published four successive weeks before the levy for that year, in some newspaper published and of general circulation in the county, or if none such is published, then in some newspaper of general circulation therein; and no levy of taxes shall be made for any other purpose or amounts than are specified in such estimate as published, but any item or amount may be stricken from such estimate or reduced at the time the levy is made. If any levy shall be made in excess of such estimate, the tax shall not therefore be void, but the members of the county board and their sureties shall be jointly and severally liable upon their official bonds for the full amount of such excess, which shall be collected by civil action as in other cases, for the use of the school fund of the county. If the members of said board neglect to comply with any other provisions of this section, the tax shall not therefore be void, but they shall each be liable to a penalty of five hundred dollars, to be recovered by civil action as in other cases, for the use of the school fund of the county." Comp. Statutes, 179.

Against the allowance of the writ it is only urged that, the commissioners having failed to include in their

annual estimate of expenses for the current year any amount whatever for "a county bridge fund," their levy of two mills on the dollar therefor was, by the above provision of statute, simply void and the tax uncollectible, and furnished no basis for the required warrant.

That the levy of this tax without such estimate was a grave mistake on the part of the commissioners there can be no doubt. But it by no means follows, consequentially, that the levy was therefore void. The statute does not so provide, but, on the contrary, declares expressly the reverse of this. The immediate consequences of omission of duties enjoined by this statute upon the commissioners are clearly set forth in the last two clauses of the above quotation. In the first of these clauses, after expressly declaring that: "If any levy shall be made in excess of such estimate, the tax shall not therefore be void," it is provided that, in such case, "the members of the county board and their sureties shall be jointly and severally liable upon their official bonds for the full amount of such excess," etc. And the second clause, which is still more sweeping, after asserting, negatively, the validity of the tax, notwithstanding the neglect of the commissioners "to comply with any other provisions of this section," declares that, "for any such neglect, they shall each be liable to a penalty of five hundred dollars," etc.

If the first clause stood alone, it being couched in terms formally mandatory, the construction contended for by the respondents would probably be justifiable. But, when taken in connection with the other two, its mandatory character is so far modified as to leave the tax to stand wholly unaffected by the failure of the commissioners to make the previous estimate as directed.

We think, therefore, that the levy was a legal basis for the required warrant, and that the writ prayed for should be awarded.

JUDGMENT ACCORDINGLY.

12	316
13	361
24	326
12	316
36	284
12	316
55	314
55	706

IN THE MATTER OF THE APPLICATION OF JAMES BALCOM,
FOR A WRIT OF HABEAS CORPUS.

Habeas Corpus: EVIDENCE. Where an examining court has jurisdiction, and it is clearly shown that an offense has been committed, and there is testimony showing that the accused probably committed the offense, the supreme court on a writ of *habeas corpus* will not weigh such evidence to see whether it is sufficient.

APPLICATION for writ of *habeas corpus*.

F. B. Tiffany, for the writ.

MAXWELL, J.

This is an application for a writ of *habeas corpus*. The petition alleges that the petitioner is illegally restrained of his liberty by one W. H. Hamilton, a constable of Boone county, and that such illegal restraint consists of the following: "That on the 20th day of August, 1881, said James Balcom was arrested upon the charge of setting fire to and burning five stacks of wheat and three of oats, and taken before one Manley B. Boardman, a justice of the peace, of Manchester precinct, in Boone county, for preliminary examination; which examination was adjourned on motion of the state, to August 23rd, 1881, and on August 23rd, 1881, said examination was, on motion of defendant, further adjourned to August 24th, 1881; that on August 24, 1881, a change of venue was taken from the said Manley B. Boardman to C. F. Diffenduffer, another justice of the peace in and for Manchester precinct, Boone county, which will more fully appear from the certified transcript of the docket of the said C. F. Diffenduffer; that upon the said examination there was no evidence which showed, or tended to show, in any manner, that an offense had been committed against the laws of the state

of Nebraska, nor was there any evidence offered, which showed, or tended to show, that there was any probable cause to believe that the said James Balcom had committed the offense charged, or any offense, against the law of the state of Nebraska."

A synopsis of what purports to be the testimony is attached to the petition, from which it appears beyond question, that five stacks of wheat belonging to one Wilton, were burned; the cause of the fire is not clear, but certainly there were some very suspicious circumstances connected with the conduct of the petitioner, sufficient to justify an examining court to require him to give bail for his appearance at the next term of the district court.

An examination before a magistrate can only be instituted by filing a complaint under oath, alleging positively the commission of an offense, and also that there is reason to believe that the accused committed the same. The finding of the justice that there is, or is not, probable cause that the accused committed the offense charged, may be entirely disregarded by the grand jury, as it is in no sense a judgment. On such an examination the rules of evidence as to the presumption of innocence in favor of the accused until he is proved guilty should be given full weight, and the magistrate should be satisfied not only that a crime has actually been committed as charged, but that "there is probable cause to believe the prisoner guilty."

A writ of *habeas corpus* is not a proceeding to correct errors, and where it appears that the court whose action is sought to be reviewed had jurisdiction; that an offense has been committed, and there is testimony tending to show that the accused committed the offense, this court in this proceeding will not weigh evidence to see whether it is sufficient to hold the accused. Should it do so the administration of justice would be obstructed, and the court would be usurping the duties of the grand jury.

The record fails to show that the accused is illegally restrained of his liberty and the writ will be denied.

WRIT DENIED.

COBB, J., dissented.

12	318
49	426
49	545

SANBORN & FOLLETT, PLAINTIFFS IN ERROR, v. D. A. HALE,
DEFENDANT IN ERROR.

1. **Petition: DEMURRER.** An objection that the plaintiffs have not legal capacity to sue must be made on that ground, and cannot be taken by a general demurrer that the petition does not state facts sufficient to constitute a cause of action.
2. ———: ———. An action was commenced by S. & F., in the firm name, and afterwards an amended petition was filed in the individual names of the partners. *Held*, on demurrer to the amended petition that the court would not look beyond the pleading demurred to.
3. ———: **SUFFICIENCY.** Indorsement by officers of a corporation, taken in connection with the allegation that there was due from the defendant to the plaintiffs the sum of \$250.00, etc. *Held*, sufficient.

ERROR to the district court for Madison county. Heard below before BARNES, J. The opinion states the case.

George B. Fletcher, for plaintiff in error, cited sec. 129, Civil Code. *Swan's Pleadings*, 181. *Ohio Life Insurance Co. v. Goodwin*, 1 Handy, 81. *Memphis v. Newton*, 2 Handy, 165.

Byron Millett, for defendant in error, cited *B. & M. R. R. v. Dick & Son*, 7 Neb., 242. *Bliss on Code Pleading*, sections 232, 233, 306, 307.

MAXWELL, J.

The plaintiffs in the firm name brought an action against the defendants, in the district court of Madison

Sanborn & Follett v. Hale.

county, to recover the sum of \$250.00, interest and costs, upon a promissory note. Afterwards they filed an amended petition, to which the defendant demurred, upon the ground that the facts stated therein were not sufficient to constitute a cause of action. The demurrer was sustained and the action dismissed. The following is a copy of the petition:

"Amended petition in the district court of Madison county, Nebraska.

Luther C. Sanborn and Judson L. Follett, doing business at Sioux City, state of Iowa, under the firm name and style of Sanborn & Follett, plaintiffs, against D. A. Hale, defendant.

The plaintiffs say: 1st. This, their action, is founded upon a promissory note, of which the following is a copy:

\$250.00. Madison county, Neb., June 27th, 1874. For value received, we jointly and severally promise to pay to the Madison County Joint Stock Company, or order, the sum of two hundred and fifty dollars, as follows: \$75.00 on or before the 15th day of October, 1874, and \$25.00 every ninety days thereafter, until the full amount is paid.

D. A. HALE.

On the back of the note is the following indorsement thereon, to-wit:

Pay Sanborn & Follett, or order, without recourse.

J. B. GIBBS, *President*.

J. D. HOOVER, *Secretary*,

Madison County Joint Stock Co.

2d. There are no credits thereon.

3d. The defendant, D. A. Hale, is liable as maker on said note.

4th. There is due from the defendant to the plaintiff on said note the sum of two hundred and fifty dollars, which they claim, with ten per cent. interest on \$75.00

thereof, from October 15th, A. D., 1874; with ten per cent. interest on \$25.00 thereof, from January 15th, A. D., 1875; with ten per cent. interest on \$25.00 thereof, from the 15th day of April, A. D., 1875; with ten per cent. interest on \$25.00 thereof, from the 15th day of July, A. D., 1875; with ten per cent. interest on \$25.00 thereof, from the 15th day of October, A. D., 1875; with ten per cent. interest on \$25.00 thereof, from January 15th, A. D., 1876; with ten per cent. interest on \$25.00 thereof, from April 15th, A. D., 1876; and with ten per cent. interest on \$25.00 thereof, from July 15th, A. D., 1876, and for which they ask judgment.

GEO. B. FLETCHER,
Attorney for Plaintiffs."

The defendant contends that the plaintiffs being partners, and suing as such, had no standing in court, as their petition does not show that the partnership was formed for the purpose of carrying on business in this state. Even if the action was brought in the firm name the objection could not be reached by a general demurrer. Objection to the legal capacity of the plaintiffs to sue, must be made under the second subdivision of section 94, of the civil code, and not under the sixth. That is, the objection should have been taken by demurrer as not showing that the plaintiffs had a legal title to the character in which they sue, and not being thus taken, is waived. Bliss on Code Pl., sec's 407-408. [Comp. Stat., 543.]

In the amended petition, however, the action is brought in the individual names of the partners, and this is sufficient, as the court will not examine the original petition.

In *Null v. Jones*, 5 Neb., 502, this court say: "In deciding whether the demurrer should be sustained, we cannot look beyond the pleading against which it is directed."

Objection is made to the form of the indorsement, as being made by the president and secretary of the Madison

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County Joint Stock Company. This, taken in connection with the allegation that "there is due from the defendant to the plaintiffs on said note the sum of \$250.00," etc., is sufficient to show a cause of action in favor of the plaintiffs.

Under the liberal rules of construction established by the code, there is no doubt that the petition states a cause of action.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

VIRGINIUS A. TURPIN, RECEIVER, ETC., PLAINTIFF IN ERROR, v. ISAAC P. COATES, AND OTHERS, DEFENDANTS IN ERROR.

12	321
15	18
16	496
20	630
12	321
26	150
12	321
38	531

ERROR: FINAL ORDER. An order discharging garnishees is an order affecting a substantial right, in a special proceeding, that may be reviewed on error before final judgment in the action.

MOTION to dismiss proceedings in error.

E. Wakeley, for the motion, cited *Lane v. Fellows*, 1 Mo., 353. *Newman v. Dick*, 23 Ill., 388. *Lawless v. Reese*, 3 Bibb., 479. *State v. Wood*, 23 N. J. L., 560. *King v. Mayor*, 36 N. Y., 182, defining "Special Proceedings." *Erie Bank v. Brawley*, 8 Watts., 539. *Nacooche v. Shaw*, 40 Ga., 492. *Adams v. Church*, 22 Mich., 79. *Coates v. Cunningham*, 80 Ill., 467.

J. R. Webster, contra.

MAXWELL, J.

In August, 1880, the plaintiff, as receiver of the Fidelity Savings Bank and Safe Depository, commenced an action in the district court of Lincoln county, against

Turpin v. Coates.

Isaac P. Coates, George A. Schufelt and John H. Rea, to recover the sum of \$6,011.95, and interest from October 4, 1878. Affidavits for attachment of the property of the defendants were made and filed, and an order of attachment issued, and returned no property found. An affidavit was then filed, alleging that certain parties named therein, residents of Lincoln county, were indebted to Coates. Copies of the order of attachment and the notice of garnishment were then served upon the parties designated, who appeared in court at the time stated in the notice, and testified as to the alleged indebtedness. The court found that nothing was due from the garnishees to Coates and discharged them. The plaintiff brings the cause into this court by petition in error. There is a stipulation in the record, that the cause shall not be tried until the disposition of a cause pending in the courts of Illinois, for the same indebtedness, but that the plaintiff may proceed to take the answers of the garnishees in the action.

The question to be determined is, will error lie from an order discharging garnishees before the final determination of the case?

Section 581 of the code provides that: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed," etc.

The attorney for the defendants contends that proceedings in garnishment are not special proceedings. And he now moves to dismiss the action upon the ground, that there being no final judgment in the action, error will not lie.

Section 581 of our code is a copy of section 512 of the code of Ohio. In the case of *Watson & Co. v. Sullivan*, 5

Ohio State, 43, the plaintiff commenced an action against the defendant in the court of common pleas and caused an attachment to be issued and levied on the property of the defendant. The attachment was dissolved before final judgment. The case was taken on error to the supreme court and the same objection made as is now urged in this court, viz: that an attachment was not a special proceeding, and that error would not lie from an order dissolving the same before final judgment. The court say: (page 45,) "Indeed the action, when there is personal service, in no manner depends on the attachment. There may be a just cause of action, and no grounds for the order of attachment. They are separate proceedings, and in the opinion of this court, the attachment is a special proceeding, which may be reversed before the determination of the action."

The object of an attachment is to obtain sufficient property or credits of the debtor to satisfy the judgment which may be recovered. This right under certain conditions the statute gives. If a court improperly deprives a party of the benefit of this proceeding, is he not thereby deprived of a substantial right? A special proceeding may be said to include every special statutory remedy which is not in itself an action. We have no doubt that an order discharging garnishees, is an order affecting a substantial right, made in a special proceeding. Such an order in many cases would entirely defeat the collection of a debt. Neither is it necessary to wait until final judgment before such order can be reviewed. No judgment can be rendered against the garnishees until after final judgment against the debtor; but if the attachment is not dissolved the creditor has a right to the security obtained by the proceedings in garnishment for the satisfaction of any judgment he may obtain. In the case at bar the testimony shows beyond question that the notes were given by the garnishees, for the unconditional payment of

money; that they are past due, and are not paid. The testimony tends to show, that Coates claims to be, and is the owner, but that there is a dispute as to the actual ownership of a part or all of the amount due. We think a clear preponderance of the testimony shows that Coates is the owner of the notes, at least there is sufficient shown to justify the court in refusing to discharge the garnishees. The motion to dismiss is overruled, and the judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

12 824
16 188

THE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY
IN NEBRASKA, APPELLANT, v. THE BOARD OF COUNTY
COMMISSIONERS OF LANCASTER COUNTY, AND LOUIS HEL-
MER, TREASURER, APPELLEES.

1. **Taxes for County Revenue: INFORMALITY IN THE LEVY DOES NOT INVALIDATE.** Wherein a levy of taxes for county revenue the several estimated objects of expenditure, and the rate for each, are set out in detail, instead of being grouped together under the single head of "general fund," as the statute contemplates, it is at most but a mere informality, in no way invalidating the tax, so long as the objects specified are those for which the commissioners are authorized to draw upon the general fund.
2. **School District Taxes: CERTIFICATE OF COUNTY SUPERINTENDENT.** A certificate from the county superintendent of schools to the county clerk, of an amount found by him to be due as between school districts, upon a division thereof, is sufficient to authorize the levy of a tax upon the property of the district or districts from which amount is found to be due.

APPEAL from Lancaster county. Tried below, before POUND, J.

T. M. Marquett, for appellant, cited Cooley on Taxation, 249, 253, 254. B. & M. v. Lancaster County, 4 Neb.,

293. *Rice v. Walker*, 44 Iowa, 458. *State v. Commissioners*, 21 Kan., 494.

Mason & Whedon, for appellees.

LAKE, CH. J.

This is an appeal from the judgment of the district court for Lancaster county. The action was brought to enjoin the collection of certain taxes levied upon the plaintiff's real estate for the year 1877, which are claimed to have been illegally imposed.

Confining our inquiry to the points now made by the appellants counsel in his brief, there is but one species of the taxes complained of in the petition to be examined, viz: a tax for a "poor house fund," so called, of two and a half mills on the dollar of the valuation. The specific road tax of four dollars per quarter section having been enjoined as prayed, and no appeal from the order having been taken by the defendants, no question concerning it is left. We will, therefore, pass directly to the poor house fund tax.

In the court below the case was sent to a referee for trial. Testimony was taken and the referee's conclusions of fact and of law reported to the court, on which report the judgment complained of was rendered. The testimony before the referee was not preserved by bill of exceptions and is not before us, therefore his findings of fact must pass unquestioned.

As to this poor house fund tax, the referee's finding of fact is in these words, viz: "The levy of poor house fund tax in controversy, was made for purposes of expenditure in completion of payment of purchase price of the poor farm, and for improvements thereon, and also for the maintenance and support of paupers, as well those receiving outside relief as those received into said poor house. The defendant levying but $7\frac{1}{2}$ mills tax for the general fund, or 'for purposes of general county revenue,

including the support of the poor,' levied the additional or remaining $2\frac{1}{2}$ mills by the name on their record of 'a poor house fund,' for the purpose of applying the same to the purposes above stated." And he found further, that what money had been realized from such levy had been so used.

The legal conclusion which he drew from this is, "that the poor house levy is good and valid. The law permitting a levy of 10 mills for general revenue, the county commissioners have in levying the 10 mills the sole jurisdiction and discretion, within that sum, to determine the rate to be levied, and the general purposes for which it shall be appropriated and expended." And this conclusion is clearly right. In making the levy there was no necessity for designating the particular uses to which the fund when raised was to be applied, the only limitation being as to the amount, and is in these words: "For ordinary county revenue, *including the support of the poor*, not more than ten mills on the dollar" valuation. Act of February 19th, 1877, sec. 2, Laws 1877, page 45.

The term "poor house fund," is not particularly definite as to the purpose for which the levy was made. We see no reason for holding that it implies an expenditure in the erection of a poor house, rather than in caring for paupers at a poor house already constructed. The expenditure of money by the county commissioners from the general fund to an unlimited extent was permissible, so long as there were means at their disposal belonging to that fund. And it seems from the finding of the referee, that what the commissioners designated as "poor house fund," was intended and used by them for the very purposes for which, what is in the law known as the "general fund," might have been properly used, viz: "pauper relief in the various modes of in-door or out-door relief. And he well says in conclusion upon this point, that "The calling, or naming this levy a poor house fund

does not in fact, * * * * change its character, or vitiate the tax."

The "general fund" of a county, as its name implies, is one devoted to a variety of uses, and its expenditure is left mainly to the discretion of the board of county commissioners. The amount which may be raised for this fund, the legislature has wisely restricted, the limitation being, as we have seen, ten mills on the dollar of taxable property. Now in the performance of the duty of determining the amount that should be raised within this limit, the commissioners must necessarily make an estimate of the probable needs of the county for the current year in the way of legitimate expenditures. Having done this, and the total rate being ascertained, suppose that, in making the levy, instead of grouping the several items together under the comprehensive head of "general fund" as is usually done, and as the statute above quoted evidently contemplates, they are set forth in detail, giving the amount estimated for each, would the tax, therefore, be illegal? We think not, so long at least as no item is included not proper to be satisfied from the general fund of the county. It would be at most but an informality, in no way invalidating the levy. The ruling of the referee was correct, and was properly sustained by the court.

Certain school district taxes were complained of in the petition, and their collection sought to be restrained, but as they are not alluded to in the brief of counsel for the plaintiff, we suppose that he does not question the correctness of the decision of the court sustaining them. At all events under the finding of the referee that they were based upon a "certificate by the county superintendent of public instruction of Lancaster county, duly made and filed with the county clerk, and ordered by him to be levied on property of the several districts, to pay the amount by him found due from one district to another on division by him of school district property, upon change

Fox v. Abbott.

of school district boundaries," they were clearly authorized by sec. 8 of the general school law, Gen. Statutes, 1962, and their enforcement is proper. We perceive no error in the matters complained of, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

12 328
14 109
16 569
18 81
19 677

19 328
34 313

12 328
56 743

12 328
59 558

13 328
60 498

12 328
62 379
62 380

JOSEPH FOX, PLAINTIFF IN ERROR, v. O. A. ABBOTT AND T. J. HURFORD, ADMINISTRATORS OF THE ESTATE OF E. W. ARNOLD, DEFENDANTS IN ERROR.

Joint Debtors: REVIVOR OF JUDGMENT. Judgment was rendered in a county court against A., B., C. and D., a transcript of which was filed in the district court. The plaintiff having died, on proceedings to revive in favor of his administrators the action was dismissed as to D., and a new judgment rendered against A., B. and C. *Held*, that the judgment being a joint liability, the revivor must be in that form.

ERROR to the district court for Hall county. Tried below before Post, J. The opinion states the case.

George W. Ambrose, for plaintiff in error.

Abbott & Caldwell, for defendants in error.

MAXWELL, J.

In September, 1875, a judgment was rendered in the probate court of Hall county against Seth P. Mobley, A. T. Potter, Joseph Fox and James Baldwin, for the sum of \$279.56 and costs, in favor of E. W. Arnold, the court finding that Fox was merely surety. Payments were made by Mobley upon the judgment, of various sums, amounting to more than \$100.00. A transcript of the judgment was filed in the district court of Hall county on the 8rd day of May, 1878, and at the October term,

1880, of said court, the death of Arnold was suggested, and a conditional order of revivor was entered, requiring the defendants therein to show cause by the next term of court why the action should not be revived in the names of the administrators, the defendants herein. This order was served upon Mobley, Baldwin and Fox, no service being had upon Potter. The court thereupon dismissed the proceedings as to him without prejudice, and rendered judgment against Mobley, Baldwin and Fox for the sum of \$245.19 and costs. Fox brings the cause into this court by petition in error.

Section 472 of the code provides that: "If either or both of the parties die after judgment, and before satisfaction thereof, their representatives, real or personal, or both, as the case may require, may be made parties to the same, in the same manner as is prescribed for reviving actions before judgment, and such judgment may be rendered and execution awarded as might or ought to be given or awarded against the representatives, real or personal, or both, of such deceased party."

Section 458 provides that: "Where one of the parties to an action dies, or his power as a personal representative cease, before the judgment, if the right of action survive in favor of or against his representatives or successor, the action may be revived, and proceed in their names."

Section 459 provides that: "The revivor shall be by a conditional order of the court, if made in term, or by a judge thereof, if made in vacation, that the action be revived in the names of the representatives or successor of the party who died, or whose powers ceased, and proceed in favor of or against them."

Section 460 provides that: "The order may be made on the motion of the adverse party, or of the representatives or successor of the party who died, or whose powers ceased, suggesting his death or the cessation of his powers, which, with the names and capacities

of his representatives or successor, shall be stated in the order."

Section 461 provides that: "If the order is made by consent of the parties, the action shall forthwith stand revived; and if not made by consent, the order shall be served in the same manner, and returned within the same time, as a summons, upon the party adverse to the one making the motion, and if sufficient cause be not shown against the revivor, the action shall stand revived."

Section 45 of the code provides that: "An action does not abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, during its pendency, if the cause of action survive or continue. In the case of the marriage of a female party, the fact being suggested on the record, the husband may be made a party with his wife, and, in the case of the death or disability of a party, the court may allow the action to continue by or against his representatives or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action."

The supreme court of Ohio in construing section 77 of the code, (section 84 of Nebraska,) say: "In an action upon a joint contract, all who are jointly liable must be joined. In this respect the rule of the common law has not been changed by our code. These propositions are not disputed by defendants in error, but they contend that, under section 77 of the code, the judgments below were authorized. It is provided by that section that "where the action is against two or more defendants, and one or more shall have been served, but not all of them, the plaintiff may proceed as follows: 1. If the action be against defendants jointly indebted on contract, he

may proceed against the defendants served, unless the court otherwise direct," etc.

We do not understand that this section was intended to modify the common law practice. The mistake of defendant's counsel, as well as of the court below, consists in placing too much stress on the word "served," and not enough on the word "action," as contained in this section. The action below was against only two of the four joint contracting parties. The filing of a petition alone does not amount to "an action." The 55th section of the code provides: "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to issue thereon." It is true, the amended petition charged W. H. Bazell and A. J. Manford, as being jointly indebted with J. B. Bazell and W. A. Simonton, but no summons was issued against the former. While, therefore, it is true that the latter were "served," it is not true that "an action" was commenced against the former. Hence, section 77 did not authorize the judgment against those of the joint contractors who were served with summons. To authorize the judgment as rendered, summons should not only have been issued against the other joint contractors, but should also have been returned not found. *Bazell v. Belcher*, 31 Ohio State, 572.

This seems to be as applicable to a proceeding to revive a judgment as in an original action. The judgment is joint. The parties are equally bound to the creditor for its payment. If an action must proceed, in form at least, against all jointly bound on a joint obligation, must it not do so when the object of the proceeding is not to render a new judgment, but to substitute parties to one already in existence? Proceedings to revive actions and judgments are borrowed from the practice in chancery. A suit in equity was abated by the death, marriage, or other disability of a party. 1 Barb. Ch. Pr., 674; 1 Van

Santvoord Eq. Pr., 302. Such abatement merely suspended the progress of the suit until new parties were brought before the court. Abatement was either as to the suit, or as to the party. If there was no longer any person before the court by or against whom the action could proceed, it must be revived before any further proceedings could be had. But, if on the death of a party, a cause of action survived to or against some other of the parties, so that a perfect decree could be made between the surviving parties, the action did not abate as to the survivors. *Id.* These distinctions seem to be preserved under the code. Under the former practice the course of procedure was by bill of revivor or supplemental bill. "Whenever a suit abated by death, and the interest of the person whose death caused the abatement was transmitted to that representative which the law gives or ascertains, as an heir-at-law, executor or administrator, so that the title could not be disputed, at least in the court of chancery, but the person in whom the title vested was alone to be ascertained, the suit might be continued by bill of revivor merely; so also, if a suit abated by the marriage of a female plaintiff, and no act was done to affect the rights of the party but the marriage, no title could be disputed; the person of the husband was the sole fact to be ascertained, and therefore the suit might be continued in this case likewise, by bill of revivor merely. If, however, upon the abatement happening, the interest of the party did not vest in any representative which the law gives or ascertains, as in the case of bankruptcy or insolvency, or of a devisee of real estate, the suit could not be continued by bill of revivor, but must, where the abatement was caused by the bankruptcy or insolvency of a defendant be continued by supplemental bill. So, where the suit abated by the bankruptcy or insolvency of a sole plaintiff, his assignees could not continue the suit by bill of revivor, but must

do so by original bill, in the nature of a supplemental bill. So also, in a suit relating to land, where a plaintiff died, having devised the land which was the subject of the litigation, the suit could not be continued on the part of the devisee by a simple bill of revivor." 2 Daniels Chancery Pl. and Pr., (4 Am. Ed.,) 1507-8.

Title 18 of the code provides a summary remedy for reviving actions by a conditional order of the court, if made in term time, or by a judge if in vacation. This order, in case of a joint action, is not against a part of the defendants. That is, if the action is against A., B., C. and D., it must be, in form at least, against all, and not merely a part. If the discharge of one, jointly bound, will discharge all, what would be the effect of dismissing the action as to one? The chapter providing for a summary revivor of actions is not exclusive. The court undoubtedly has power under section 45 of the code to allow the action to be prosecuted by or against the representatives of a deceased party, in which case supplemental pleadings may be filed and summons served as in the commencement of an action. And this is the practice in Ohio under a similar statute. *Carter v. Jennings*, 24 Ohio State, 182. The judgment being unauthorized must be reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

E. P. SWEARINGEN, PLAINTIFF IN ERROR, V. CHARLES
ROBERTS, DEFENDANT IN ERROR.

12	333
49	565
51	37
12	333
159	136

Judicial Sale: REDEMPTION. Where real estate has been sold under a decree of foreclosure, to any person not a party plaintiff to the action, the owner of the equity of redemption may redeem the same at any time before the confirmation of the sale by pay-

Swearingen v. Roberts.

ing to the purchaser the purchase money, together with twelve per cent. interest thereon, from the date of sale to the date of redemption.

ERROR to the district court for Polk county. Tried below, before Post, J.

J. R. Webster and *H. H. Grimes*, for plaintiff in error.

Higgins & Crites, for defendant in error.

MAXWELL, J.

The question to be determined in this case is, whether or not the owner of real estate, which has been sold to one not the plaintiff in the action under a decree of foreclosure, must, in order to redeem the same, pay or tender the entire amount of the decree, with interest and costs, with 12 per cent. additional interest on the purchase money, or only the amount paid by the purchaser, with 12 per cent. interest thereon. The question depends upon the construction to be given to section 497a of the code, (Comp. St., 595,) which is as follows: "The owners of any real estate against which a decree of foreclosure has been rendered in any court of record, or any real estate levied upon to satisfy a judgment or decree of any kind, may redeem the same from the lien of such decree or levy at any time before the sale of the same shall be confirmed by a court of competent jurisdiction, by paying into court the amount of such decree or judgment, together with all interest and costs; and in case the said real estate has been sold to any person, not a party plaintiff to the suit, the person so redeeming shall pay to such purchaser 12 per cent. interest on the amount of the purchase price from the date of sale to the date of redemption, or deposit the same with the clerk of the court where the decree or judgment was rendered."

The word "redeem" is defined by Webster "to purchase back; to regain possession by payment of a stipulated price; to re-purchase." According to the strict rules of the common law, unless the mortgagor or his heirs, by payment of the mortgage money and interest, at the time and place appointed, strictly complied with the conditions upon the fulfilment of which it was stipulated that he should re-enter on his estate, it became the property of the mortgagee, even though it greatly exceeded in value the amount of the loan. Littleton says: "If a feoffment be made upon such condition, that, if the feoffor pay to the feoffee at a certain day * * * £40 of money, then the feoffor may re-enter. If he doth not pay, then the land, which is but in pledge upon condition for the payment of the money, is taken away from him forever and so dead to him, upon condition." Section 810.

Courts of equity, however, from an early period, have held that until foreclosure the mortgagor, if he applied within reasonable time, and offered to pay the amount due, and costs, might redeem the forfeited estate. This right to redeem, as it could be enforced only in a court of equity, was called the equity of redemption. In *Howard v. Harris*, 1 Vern., 190, decided in 1688, it was held that no agreement in a mortgage could make it irredeemable; and the right of redemption attaches to every mortgage. Under the English chancery practice, proceedings to foreclose a mortgage were not for a decree directing a sale of the mortgaged premises to satisfy the amount found due, but directing the defendant to pay the amount due on the mortgage by a day to be named, on the failure of which his right to redeem would be barred. But until the time fixed in the decree had elapsed, the owner of the equity of redemption could pay the amount due on the mortgage and redeem. Our statute provides for a sale of the mortgaged premises, the proceeds of the sale to be applied to the satisfaction of the decree. The right

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of redemption continues up to the time of the confirmation of the sale.

Our statute seems to provide for two classes of purchasers: *First*, if the premises are purchased by the plaintiff in the action, the owner of the equity of redemption may redeem by paying into court the amount of the decree, together with all interest and costs; *second*, when any person not the plaintiff is the purchaser, the party redeeming must pay the purchaser the amount of the purchase money, together with 12 per cent. interest thereon from the date of the sale to the time of redemption, or pay the same into court. This transaction is entirely between the owner of the equity of redemption and the purchaser. If the owner redeems, the purchaser receives 12 per cent. interest for the use of his money, the owner of the equity retains the real estate, and the creditor receives the amount of money for which the premises were sold.

It is very strenuously insisted that in any case a party redeeming must pay the amount of the decree, interest, and costs; and if the premises are sold to any person not the plaintiff in the action he must, in addition, pay the purchaser 12 per cent. interest on the purchase money. There is no doubt the language used in the section above quoted, if taken by itself, will admit of that construction. But is that the necessary or proper construction? We think not. In construing remedial statutes there are three points to be considered: the old law, the mischief, and the remedy. And it is the duty of courts so to construe the act as to suppress the mischief and advance the remedy. 1 Bl. Comm., 87.

At the time the act under consideration was passed, the owner of the equity of redemption had no right to redeem after the sale. The design of the law, therefore, evidently was to extend the right of redemption to the time of confirmation. Prior to its passage the owner of the

equity of redemption, at any time before the sale, could redeem by paying the amount of the decree, interest, and costs. The statute continues that right in force upon the same conditions, if the plaintiff is the purchaser, up to the date of confirmation. There would seem to be reason in this. The plaintiff has a claim for a definite sum, which is a lien upon the real estate, but is usually less than its value. The estate, therefore, in most instances may be presumed to be of as much or greater value than the amount of the debt; therefore, if the owner of the equity of redemption wishes to redeem he must do so from the decree. But how can this principle apply to the case of a purchaser other than the plaintiff in the action? All that the plaintiff can obtain in such case is the amount of the purchase money; and upon its payment, if the sale is confirmed, his lien is absolutely divested, and he has no further claim against the estate.

The creditor does not seem to have any interest in the matter, as it can make no difference to him whether the purchase money is derived from the purchaser or the debtor. The object of the statute is to grant relief to the debtor, and the legislature certainly did not intend to place hindrances in the way of redemption by imposing upon the debtor the payment of 12 per cent. to the purchaser in addition to the interest on the decree. It is an established rule, in the interpretation of a statute, that the intention of the law-givers is to be deduced from the whole statute taken and compared together. "The real intention, when accurately ascertained, will always prevail over the literal sense of terms. When the expression of a statute is special or particular, but the reason is general, the expression should be deemed general, * * * and the reason and intention of the law-givers will govern the strict letter of the law, when the latter would lead to palpable injustice, contradiction, and absurdity." 1 Kent Com. 462.

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The above is peculiarly applicable to this case; the evident intention of the statute being to allow the party redeeming from one not the plaintiff in the action, to do so by paying the purchase money and 12 per cent. interest. The question whether the rate of interest to which the purchaser is entitled is affected by the usury laws of 1879, is not involved in this case, and will not be considered.

The judgment is therefore reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

LAKE, CH. J., dissenting.

By the stipulation of counsel but a single question is presented for our consideration, viz., whether the plaintiff in error could redeem his land from the sale made pursuant to the decree of the district court by paying the purchase price, together with interest thereon at the rate of 12 per cent. per annum and costs? On the part of the defendant in error it is claimed that he could only redeem by paying the whole amount of the decree, without reference to the price for which the land was sold, and in addition to this 12 per cent. interest to the purchaser on the amount of his bid.

At first I was strongly inclined to adopt the view of the plaintiff in error, but further reflection leads me to the conclusion that it is not the proper one to take. The right of redemption is claimed under the following provision of the statute: "That the owners of any real estate against which any decree of foreclosure has been rendered in any court of record, or any real estate levied upon to satisfy any judgment or decree of any kind, may redeem the same from the lien of such decree or levy, at any time before the sale of the same shall be confirmed by a court of competent jurisdiction, by paying into court the amount of such decree or judgment, together with all in-

terest and costs; and in case the said real estate has been sold to any person not a party plaintiff to the suit, the person so redeeming the same shall pay to the said purchaser 12 per cent. interest on the amount of the purchase price from the time of the sale to the date of redemption, or deposit the same with the clerk of the court where the decree or judgment was rendered." Laws 1875, p. 57; Comp St. 595, § 497.

On a careful examination of this provision I think it will be conceded that it is somewhat peculiar, differing essentially from those ordinarily made for the redemption of lands from sales merely under decrees or executions. The privilege which it gives to the debtor is not to redeem his land from the sale alone, but from the "decree or levy." This, of course, can only be done in the mode directed, which is "by paying into court the amount of such decree or judgment, together with all interest and costs;" and, if sale has been made to a person other than the plaintiff or judgment creditor, there must also be paid to the purchaser "12 per cent. interest on the amount of the purchase price from the date of the sale to the date of the redemption," or deposited for him "with the clerk of the court" in which the decree or judgment was rendered. The first clause of this provision is plain enough. No doubt seems to be entertained as to its meaning. It confers no right whatever, except upon the precedent condition of payment of the whole amount for which the debtor is liable under the judgment or decree, including interest and costs. This much is given to the judgment creditor in all cases of redemption under this law.

The precise meaning of the last clause may be somewhat obscure, but I think a little reflection will make it apparent that it is merely an additional requirement to the right to redeem in those cases wherein a stranger to the record becomes the successful bidder. It is evidently

based upon the hypothesis that sheriffs do their duty in making such sales, in this, that they exact prompt payment of the amount of the accepted bid. If this be done, and the purchase is avoided by redemption, it is but just, and so the legislature probably thought, to remunerate the bidder for his trouble, and the loss of the use of his money while idle in the sheriff's hands, by giving him interest as here provided. On the setting aside of the sale the amount of his bid would, of course, be returned to him by the officer holding it.

The construction sought by the plaintiff in error, that he was entitled to redeem from the sale merely by paying "the purchase price and interest from the date of sale to the date of redemption," is not justified by any words found in the provision. It nowhere says that he shall pay the "purchase price" to the purchaser, or deposit the same with the clerk of the court for his use. "The purchase price," before confirmation, is in the hands of the officer making the sale, or should be, and its final disposition depends wholly upon whether the sale shall be confirmed or set aside. It cannot be paid to the judgment or execution creditor except upon the event of confirmation. But if the sale be vacated, it is as if it had never been, and the money paid to the sheriff by the purchaser is to be returned to him. I am certainly aware of no rule by which, in the event of such sale being set aside, that purchase money thus held could be paid over to the creditor. And the rule must be the same whether the sale be vacated by order of the court reviewing it, or as the result of redemption under the law. If the sale fail from either cause, surely nothing can come of it to benefit the creditor.

Giving to the language of the section its ordinary meaning, which is a rule to be observed in the construction of statutes, is it not clear that the privilege which it gives is fully expressed by the first clause? That privilege, as

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before shown, is to redeem the land from "the decree or levy," which can be done only "by paying into court the amount" due upon the "decree or judgment, together with all interest and costs." The second clause confers no right whatever upon the debtor, but simply imposes upon him an additional duty; it requires that "the person so redeeming" shall pay, etc. The term "so redeeming" is one of reference, and relates back unquestionably to that part of the preceding clause which points out the mode by which a redemption may be effected, viz., "by paying into court the amount of such decree or judgment," etc.

After bestowing much reflection upon the statute I see no reason to doubt the entire soundness of the construction given by the district judge, and am of opinion that it should be affirmed.

CHARLES L. FLINT, PLAINTIFF IN ERROR, v. WILLIAM GURRELL, DEFENDANT IN ERROR.

Service by Publication in Supreme Court. When a petition in error is filed in the supreme court, and it is necessary to obtain service upon the defendant in error by publication, such publication must be made four successive weeks in a newspaper published in Lancaster county.

MOTION for an order designating the county in which service may be made by publication.

Leese & Lewis, for the motion.

BY THE COURT.

This is an action to quiet title. The plaintiff alleges in his petition that he is the owner of the legal title, and

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is in possession of certain lands in Seward county, and that the defendant claims an interest in said lands adverse to him. Service was had upon the defendant in the district court by publication. The defendant made no appearance in the action. The district court dismissed the action and the plaintiff has filed a petition in error in this court, and an affidavit that the defendant is a non-resident of the state, and has no attorney of record, and service of summons cannot be made on the defendant in this state. The plaintiff therefore asks the court to designate the county in which service may be made by publication.

Section 51 of the code provides that: "Actions for the following causes must be brought in the county in which the subject of the action is situated, except as provided in section fifty-two. *First.* For the recovery of real property, or of an estate or interest therein. *Second.* For the partition of real property. *Third.* For the sale of real property under a mortgage, lien, or other incumbrance or charge."

Section 77 provides that: "Service may be made by publication in either of the following cases: *First.* In actions brought under the fifty-first section of the code, when any or all of the defendants reside out of the state," etc.

Section 79 provides that: "The publication must be made four consecutive weeks in some newspaper printed in the county where the petition is filed," etc.

Section 584 provides that: "The proceedings to obtain such reversal, vacation, or modification, shall be by petition, to be entitled a "petition in error," filed in a court having power to make such reversal, vacation, or modification, setting forth the errors complained of, and thereupon a summons shall issue and be served, or publication made, as in the commencement of an action," etc.

Publication is to be made in the county in which the

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petition is filed. The petition in error in this case being filed in Lancaster county, the service by publication will be made in that county. It is therefore ordered that service by publication be made for four successive weeks in the *State Journal* of Lincoln.

ORDER ACCORDINGLY.

ALICE LOOSEMORE, PLAINTIFF IN ERROR, v. WILLIAM SMITH
AND OTHERS, DEFENDANTS IN ERROR.

1. **Probating Will: JURISDICTION OF COUNTY COURT.** The county court has original jurisdiction in the probate of a will, and its order admitting a will to probate is conclusive, unless by a direct proceeding, by appeal, or otherwise, it is reversed.
2. ———: **JURISDICTION OF DISTRICT COURT.** The district court has no original jurisdiction to set aside a will or the probate of the same.

ERROR to the district court for Otoe county. Heard below before POUND, J.

Watson & Wodehouse, for plaintiff in error.

Edwin F. Warren and *F. E. Brown*, for defendants in error.

MAXWELL, J.

This is a petition in equity to set aside the will of one Thomas Smith, deceased, which will was admitted to probate in the county court of Otoe county, on the 31st day of December, 1879. The question to be determined is, is the probate of a will conclusive in the absence of a statute authorizing the filing of a petition in equity to set it aside? In other words, in the absence of a statute conferring authority, has the district court original jurisdiction in such case?

Section 143 of chapter 23, Comp. Statutes, entitled Decedents, provides that: "No will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the probate court as provided in this chapter, or on appeal in the district court, and the probate of the will, of real or personal estate, as above mentioned, shall be conclusive as to its due execution."

In the case of *Tarver v. Tarver*, 9 Peters, 174, it was held that an original bill would not be sustained on an allegation that the probate of the will was void; that if any error was committed in admitting the will to probate it should have been corrected on appeal. To the same effect is the Broderick will case. 21 Wall., 504.

In *Bumstead v. Reed*, 31 Barb., 661, it was held that where, upon an application to a surrogate for probate of a will and for letters testamentary thereon, the residence of the testator at the time of his death, in the county of such surrogate, is plainly averred in the petition, and is not in any way controverted, but is substantially admitted by all the parties interested in said bill, and is practically established by sufficient evidence, as a fact, by that tribunal, that court has jurisdiction of the case; its determination is conclusive as to the validity and probate of the will, and cannot be examined or assailed in any collateral proceeding, or in any other tribunal of original jurisdiction.

In *Matter of will of Warfield*, 22 Cal., 51, it was held that where the probate court acquires jurisdiction to probate a will by the presentation to it of a proper petition for that purpose, and the publication of notice of the time of proving the will, and afterwards in such proceeding admits the will to probate, its determination is final, except upon a direct proceeding by appeal, or otherwise, to reverse it, and cannot be questioned collaterally. To the same effect is *Rogers v. King*, Id., 71. *State v.*

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McGlynn, 20 Id., 233. *Castro v. Richardson*, 18 Id., 478. *Telford v. Barney*, 1 G. Greene, 575. *Singleton v. Singleton*, 8 B. Mon., 340. *Hughey v. Sidwell*, 18 Id., 259. *Tabhott v. Berry*, 10 Id., 473. *Jourden v. Meier*, 31 Mo., 40. *Poplin v. Hawke*, 8 N. H., 124. *Hill v. Burger*, 10 How. Pr., 264.

The statutes of a number of the states provide for commencing an original action within a limited period, for the purpose of establishing the invalidity of a will, but we have no such statute, and under our law an order admitting a will to probate is conclusive, unless an appeal is taken to the district court as provided in secs. 42 and 43 of the probate law. [Comp. Stat., 210]. This being an original action, and the district court having no jurisdiction in such case, its judgment dismissing the case must be affirmed.

JUDGMENT AFFIRMED.

J. O. WESCOTT, PLAINTIFF IN ERROR, v. DAVID ARCHER, DEFENDANT IN ERROR.

1. **Attachment: ISSUING SUMMONS.** Where the real estate of a debtor is levied upon under an attachment, and an affidavit is filed stating that he is a non-resident, and service of summons cannot be made upon him in the state, no summons need be issued.
2. **—: SERVICE BY PUBLICATION.** Where an attachment is levied upon the real estate of a non-resident, and service of summons is not made upon him, the court possesses no power to render judgment against him and order a sale of his property to satisfy the same, unless publication has been made as required by law, and the notice should contain a description of the property attached.
3. **Proof of Publication.** The publisher of a newspaper, or any one acquainted with the facts, may make proof of publication.

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ERROR to the district court for Lancaster county. Tried below before POUND, J.

Harwood & Ames, for plaintiff.

W. J. Lamb (*H. H. Wilson* with him) for defendant.

MAXWELL, J.

This is an action of ejectment. Judgment was rendered in favor of the defendant in the court below. The plaintiff brings the cause into this court by petition in error. It appears from the record that one Emma L. Wright is the common source of title of the plaintiff and defendant, and that on the 15th day of March, 1879, she conveyed the premises in controversy to the plaintiff; that on the 16th day of August of that year, Sampson, Wilkinson & Co. commenced an action against the plaintiff, in the district court of Lancaster county, to recover the sum of \$140.40, and caused the lands in dispute to be attached; that afterwards judgment was rendered in said action, and the lands in controversy sold to one Hume; that said sale was confirmed, and a deed made by the sheriff to said Hume, who afterwards, by his attorney in fact, conveyed to the defendant.

It is conceded that the plaintiff was a non-resident of the state, and that service of summons could not be made upon him; that a sufficient affidavit for an attachment was duly filed; and that all the proceedings in that action are regular except that no summons was issued for the plaintiff in error (defendant below); and it is claimed that the notice of publication, and the proof of the same, are insufficient. When a defendant is a non-resident of the state, and service of summons cannot be had upon him therein, no summons need be issued, as the law does not require a vain thing.

It is very strenuously insisted by the defendant in error, that even if we find the notice so defective as to be

invalid, that no notice was necessary to authorize the court to render a valid judgment in an action by attachment, where the object is to subject the property attached to the payment of the judgment.

In the case of *Paine v. Moreland*, 15 Ohio, 485, the action was ejectment. The defendant claimed title under a sheriff's deed, made in pursuance of a sale under the attachment, no notice having been given. The court held that the proceedings were not void, but voidable. In the opinion it is assumed that because the statute gives the court the right to sell perishable property, it therefore has the right to dispose of property without notice, whether it is perishable or not. The court overlooks the fact that the only reason a court is authorized to sell perishable property is because the property being taken out of the custody of the debtor and placed in the custody of the law, therefore the court, for the purpose of caring for the property, is a bailee, and it is its duty to see that the property is not lost or destroyed. The right to sell the property in such case grows out of the care that the law exercises for the protection of the property or its proceeds for the benefit of the party entitled to the same, and not from any authority to condemn the title, and divest the title from the owner thereof without giving him opportunity to be heard. The language of the statute is: "The court shall make proper orders for the preservation of the property during the pendency of the suit. It may direct a sale when, because of its perishable nature, or the costs of keeping it, a sale will be for the benefit of the parties." Comp. St., 558. The object is to prevent loss as far as possible, and not to determine who is entitled to the proceeds of the sale. But the authority to sell perishable property would confer no right to sell property as such that clearly was not perishable, such as real estate, and a judgment of that kind would be void.

But a logical deduction from the opinion of the court in the case cited is, that if the court decided that real estate—wild land—was perishable property, and therefore ordered a sale of the same before judgment, the sale would be a mere irregularity, and, if not reviewed on error, would be valid. It is said the court acquires jurisdiction by its own process; that the writ draws the person or thing within the power of the court; and that this confers jurisdiction. That is true in all cases where the process of the court has been legally served upon the defendant, but it is not correct if it is sought to condemn the property of a party without a hearing. To hold that a court, by the simple levying of its process upon the property of a debtor, may then proceed without notice to render judgment against such debtor, and sell his property to satisfy the same, is to hold that the constitutional guaranty, that no person shall be deprived of his property without due process of law, is of no effect. Can it be said that a party whose property has thus been condemned has had his day in court? The fallacy of the reasoning in such case is in saying that because the property was under the control of the court, it therefore had authority to render judgment against the defendant and sell his property to satisfy the same.

Suppose the defendant was a resident of the state, and an attachment was secretly issued out of the district court and levied upon his property, but no service had upon him, could the court proceed to find that he was a non-resident of the state, and thereupon proceed to render judgment against him and order his property, taken under the attachment, to be sold? If the doctrine laid down in the case of *Paine v. Moreland* and cases following it, is correct, it could do so, because the court had acquired jurisdiction by the attachment of the debtor's property. How can it be said that a court has authority to hear a cause, unless the parties to be affected are before the court, either by appear-

ance, or by actual or constructive service? If there is no action against a party, there can be no condemnation of his property; and where there is no appearance, no action can proceed to judgment without actual or constructive service upon the defendant. The attachment is merely for the purpose of retaining the property in the custody of the law until it is determined whether the plaintiff is entitled to recover.

If a plaintiff can commence an action by attachment against a non-resident, cause his property to be levied upon and sold without giving him an opportunity to appear and defend the action, a wide door will be opened for the perpetration of fraud, and the court become the instrument for its accomplishment. A plaintiff with a valid cause of action has nothing to fear from the publication of notice, while a court with proof of proper service on file has the assurance that the law has been complied with, and that it is not being used as a medium to unjustly deprive a party of his property. We hold, therefore, that where an attachment is levied upon property, and there is no personal service, there must be a service by publication to give the court jurisdiction, and no judgment is valid without such notice. *King v. Harrington*, 14 Mich., 532. *Miller v. Babcock*, 29 Mich., 526. *Anderson v. Coburn*, 27 Wis., 558.

Such notice should, in some way, describe the property attached. If real estate is taken, it should be described in such manner as to identify it. The object is publicity, and this can best be obtained by an accurate description of the property levied upon. The notice in this case is wholly defective in this regard, there being no attempt to describe the property attached.

The notice is also defective in not being intelligible, many of the words being but little better than blanks.

Objection is made to the proof of publication. The affidavit was made by the publisher of the *Lincoln Globe*,

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and this is sufficient, under our statute, as any person knowing the facts may make the proof. And where a competent person makes an unequivocal oath of the fact, he will be presumed to possess the knowledge necessary to make it.

For the reason that no valid notice of the pendency of the action under the attachment, by describing the property attached, was given, the judgment is reversed and cause remanded for further proceedings.

REVERSED AND REMANDED.

LAKE, CH. J., dissenting.

Upon the main branch of this case, I find myself unable to concur in the foregoing opinion. The conclusion therein arrived at, that the judgment is void, for the simple reason that the published notice of the bringing of the suit was "defective" in the omission of a "description of the property levied upon," is to my mind a novel one, and unsupported by any adjudged case under a statute similar to our own to which our attention has been called. It is, as I think, unfounded in reason, and does violence not only to the plain language of our attachment law, but also to the previous ruling of this court, upon precisely the same question.

The infirmity in the position taken by the majority of the court is radical. It lies in the unwarranted assumption that the notice in question was what gave the court its jurisdiction over the attached property. To show that this assumption is not sanctioned, I will refer to some of the provisions of our attachment law bearing upon the question.

And, first, sec. 198 of the civil code, provides that: "The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated," etc. One of the grounds

stated is: "When the defendant, or one of several defendants, is * * * a non-resident of this state."

Sec. 199 provides that: "An order of attachment shall be made by the clerk of the court in which the action is brought, in any case mentioned in the preceding section, when there is filed in his office an affidavit of the plaintiff, his agent, or attorney, showing: *First.* The nature of the plaintiff's claim. *Second.* That it is just. *Third.* The amount which the affiant believes the plaintiff ought to recover. *Fourth.* The existence of some one of the grounds enumerated in the preceding section."

Sec. 205 is mandatory to the sheriff, who, upon receiving the order of attachment, must serve it "without delay" by a seizure of the property when that is possible. Where the property attached is real estate, he must "leave with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the order." But, if it be personal property, and accessible, "he shall take the same into his custody, and hold it subject to the order of the court." This done, the property so seized is in *custodia legis*, for sec. 212 in express terms provides that: "An order of attachment binds the property attached from the time of service;" and, sec. 218, that: "The court shall make proper orders for the preservation of the property during the pendency of the suit," even to the extent of directing its sale, "when, because of its perishable nature, or the cost of keeping it, a sale will be for the benefit of the parties."

Now, by the light of these provisions, is it not manifest that the jurisdiction of a court over attached property, under our statute, depends, not upon a notice to the defendant of the pendency of the action, by summons, or by publication, but upon the fact of a proper affidavit having been filed for the issuing of the order under which it was seized? Can property be so bound, and subjected to such orders, and still the court be, as my brethren

hold, without jurisdiction over it? Can the court by an interlocutory order direct the sale of attached property, for any reason, without the assent of the owner, whereby the title may be transferred from him to the purchaser, and this without possessing any jurisdiction over it? Surely not. If the right to exercise such powers over the property of a debtor be not jurisdiction, what is it? Webster's definition of the word jurisdiction, when used with reference to judicial power is, "the right of administering justice through the laws, by the means which the laws have provided for that purpose." It seems to me that the authority given to courts over attached property from the time of its seizure, independently of whether jurisdiction over the person of the defendant has been acquired or not, falls clearly within this definition.

The majority of the court seem to have forgotten that, in an attachment case, the jurisdiction may be twofold—that over the person, and that over the property seized—and that neither one is really dependent upon the other. Over the person jurisdiction can be required only by the service of a summons, or a voluntary appearance; while over the property it is obtained by an actual seizure, under a writ lawfully issued.

It is conceded in the opinion of the court, prepared by my brother Maxwell, "that a sufficient affidavit for an attachment was duly filed, and that all the proceedings, save the published notice to the defendant, were regular." This concession, as I think, is fatal to the conclusion to which the court has come. It shows conclusively that there was good ground for issuing the order of attachment, and that the property was lawfully seized and brought within the control of the court. It establishes, beyond all cavil, that the property was in the custody of the law, and subject to the orders of the court respecting it. This being so, while those orders may have been erroneous, and therefore voidable, they very clearly were not void.

My associates, however, concede that the court, without the knowledge of the defendant, could sell perishable property, but contend that it had no authority "to sell property, as such, that clearly was not perishable." But why not, pray? The statute before quoted provides that a sale may be ordered when the property is perishable, or when the expense of keeping it may be great, and a present sale beneficial. But who is to determine the existence of the facts on which the right to make the order to sell depends? Why the very court under whose control the property is. But suppose the court should commit a palpable error in this respect, and order a sale of property which was neither perishable, nor the cost of keeping it considerable, would the sale therefore be a nullity? According to the reasoning in the opinion of the majority of the court, where the ground is taken that the jurisdiction to sell depends upon the perishable character of the property, and not upon a seizure under a lawful writ, it would. I believe, however, that the sale would be valid, and that the purchaser would take a good title under it. As was said by this court in *Crowell v. Johnson*, 2 Neb., 146. "The court had acquired jurisdiction of the property *by the levy of the order of attachment thereon*. The necessary affidavit for the attachment had been filed, and order duly issued and levied, whereby the property of the debtor was taken from him, and placed in the custody of the law." This done, the fact that it was possible for the court to commit errors respecting it, or that it may have done so, could not have the effect to overthrow the jurisdiction thus acquired.

And the same is true of the subsequent notice published to the absent defendant. Being beyond the jurisdiction of the court, although his property was within it, he was entitled to such notice as the statute provided should be given, but only because the statute required it, it being a proceeding *in rem*. There is nothing in the nature of

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such proceedings that renders the publication of a notice essential, and the legislature could, doubtless, dispense with it altogether if they should see fit to do so. In the case last cited this court expressly held that although the published notice failed to conform to the requirements of the statute, the proceeding was not for that reason void, but only voidable. "It may be reversed in a proceeding instituted for that purpose, but it cannot be assailed collaterally."

Drake, in his work on Attachment, section 437, says upon this subject: "This notice is not necessary to give the court jurisdiction of the action. * * * * Whether a court has jurisdiction of any particular proceeding is determined by establishing its authority to take the first step therein. * * * * When, therefore, in an attachment cause the ground required by statute has been laid for the issue and execution of the process, and the process has been issued and executed, the jurisdiction of the court has attached. If this ground be not laid, there is no right to take the first step, and that and all subsequent ones are void. When, however, jurisdiction has been attained, the subsequent proceedings must conform to the law in order to make the action of the court effectual. Want of such conformity will be error, and, therefore, good ground for reversing the judgment of the court; *but it will not make the proceedings void.*"

Applying the law thus clearly set forth to the case under consideration, it is very clear to my mind that the judgment of the court below should be affirmed. The ground for the "*first step*" was well "laid" by the filing of the necessary affidavit; the process of the court—the order of attachment—was duly issued and the property seized. This gave the court jurisdiction. I see no reason for disregarding the former decisions of this court, especially when in harmony with those of other states under statutes similar to ours. See Drake on Attachment, section 448, and cases cited.

STATE OF NEBRASKA, PLAINTIFF IN ERROR, V. JACK PAGE,
DEFENDANT IN ERROR.

Bill of exceptions on part of State. A prosecuting attorney presenting a bill of exceptions to the supreme court under the provisions of section 483 of the criminal code, must obtain leave of court to file the same.

APPLICATION by district attorney for leave to file papers in above entitled cause.

By THE COURT.

The question to be determined in this case is, whether a prosecuting attorney may, as of course, file in this court a bill of exceptions taken under the provisions of section 483 of the criminal code, or whether he must first obtain leave of this court to file the bill.

Section 515 of the criminal code provides that: "The prosecuting attorney may present to the supreme court any bill of exceptions taken under the provisions of section 483, and apply for permission to file it with the clerk thereof for the decision of such court upon the points presented therein; but prior thereto he shall give reasonable notice to the judge who presided at the trial in which the bill was taken, of his purpose to make such application, and if the supreme court shall allow such bill to be filed, such judge shall appoint some competent attorney to argue the case against the prosecuting attorney, which attorney shall receive for his services a fee not exceeding \$100, to be fixed by such court, to be paid out of the treasury of the county in which such bill was taken."

Section 516 provides that: "If the supreme court shall be of the opinion that the question presented should be decided upon, they shall allow the bill of exceptions to be filed, and render a decision thereon."

The exceptions presented in this case are not in the

form of a bill of exceptions, but are part of the records in the case, being a plea in abatement of the defendant to an indictment against him. But we think the case comes within the provisions of section 488, as the object of that provision is to determine the law to govern in any similar case then pending, or which may thereafter arise. The case therefore falls within the provisions of section 515, and leave of court must be obtained to allow such bill to be filed. The sections above quoted are copied from the statutes of Ohio, and in that state leave seems to be required. This was the rule in civil actions in this state until the constitution of 1875 gave the right of review in that class of cases.

The questions presented by the record seem to be of sufficient importance to be reviewed in this court. Leave is therefore given to file the case.

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THE COUNTY OF WASHINGTON, PLAINTIFF IN ERROR, v.
L. R. FLETCHER, DEFENDANT IN ERROR.

Constitutional Law: REFUNDING TAXES. The act which took effect February 20th, 1879, for the repayment of taxes levied on school lands, the legal title of which is in the state, is not in conflict with the constitution.

ERROR to the district court for Washington county.
Tried below, before SAVAGE, J.

Jesse T. Davis and *J. C. Cowin*, for plaintiff in error.

L. W. Osborn, for defendant in error.

MAXWELL, J.

In 1879 the defendant presented a claim to the board of county commissioners of Washington county for taxes

paid by him upon certain school lands in that county purchased by him from the state. The lands seem to have been purchased from the state in 1869, and the legal title is still in the state. The commissioners rejected his claim. On appeal to the district court judgment was rendered in his favor for the sum of \$209.90. The county brings the cause into this court by petition in error.

The county has filed no answer or other pleading setting up any defense.

The action is brought under the provisions of the "Act to provide for the repayment of moneys paid as taxes on lands, the title of which rests in the state, by persons holding said lands under contract of sale or by lease," which took effect February 20, 1879. The act reads as follows:

"Whereas, in the different counties of the state of Nebraska, there are many persons holding school lands under contract of sale or under lease from the state of Nebraska, the title to said lands being now vested in the state; and whereas, said school lands have not been and are not now taxable for any purpose whatever, therefore—

"Be it enacted by the legislature of the state of Nebraska:

"Section 1. That money heretofore received by the county treasurers of the several counties within the state of Nebraska, on account of taxes levied on lands, the title to which rests in the state of Nebraska, from persons holding said lands under contract of sale or lease, shall be repaid without interest to persons who have paid the same, their heirs, executors, or assigns.

"Sec. 2. That said moneys shall be repaid by the respective county treasurers, on orders in that behalf made by the county commissioners of the respective counties.

"Sec. 3. That no order shall be made by the county commissioners of any county for the repayment of money

paid as aforesaid into the treasury except upon the production of a receipt from the treasurer of the county, acknowledging the payment of money as taxes aforesaid, on lands owned by the state of Nebraska.

"Sec. 4. The county commissioners of any county whose school lands have been wrongfully taxed, and the taxes have not yet been paid, shall order the county treasurer to cancel the same."

It is claimed on behalf of the plaintiff that the law above quoted is in conflict with sections 1, 2, 3, and 4, of article 10 of the constitution, which read as follows:

"Section 1. The legislature shall provide such revenue as may be needful by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct; and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, inn-keepers, liquor dealers, toll bridges, ferries, insurance, telegraph, and express interests or business, vendors of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates."

Section 2 provides for the exemption of certain property. Section 3 provides for the redemption of real estate sold at tax sale. Section 4 provides that the legislature shall have "no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation or property therein, from their or its proportionate share of taxes to be levied for state purposes or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

The chief justice and the writer, as members of the legislature of 1865-6, assisted in forming and submitting to the people the constitution which was adopted in 1866.

Section 2, of article 7, of that constitution provided that: "The university lands, school lands, and all other lands which have been acquired by the territory of Nebraska * * * * for educational or school purposes, shall not be aliened or sold for a less sum than five dollars per acre." The object of this provision was to protect the school fund and prevent the sale of school lands at less than their value. The act of 1867 in relation to school lands, provides for appraising school lands, and provides that they are to be offered at public sale upon due notice and sold to the highest bidder; no bids to be received for less than seven dollars per acre, nor for less than appraised value. Under this law large quantities of land have been sold at very high prices.

It is claimed, and, if the various acts passed by the legislature to grant relief to purchasers of school lands are to be taken as an indication of the popular belief upon that question, the opinion generally prevailed, that such lands were not taxable, which fact materially increased the price received for the lands sold. The case of *Hagenbuck v. Reed*, 3 Neb., 1, held that the revenue law of 1869 included school lands within its terms. Undoubtedly school lands are embraced within the letter of that act, as section 2 provides that this section "is intended to embrace lands and lots in towns, including lands bought from, or donated by, the United States and this state, and whether bought on credit or otherwise." There was no provision in the law for the sale of the interest of the purchaser as personal property, and while a sale for taxes could not divest the state of its title, it had the effect to encumber the title of such lands as reverted to the state, and thereby tended to discourage a resale of the same. This, among other considerations, doubtless, induced the legislature to pass the act for the repayment of taxes.

Section 6, of article VIII of the constitution, requires the legislature to provide for the free instruction in the

schools of the state of all persons between the ages of 5 and 21 years. This free instruction must be provided by taxation, unless by a sale of school lands a sufficient amount can be derived from the interest on the gross amount of such sales for that purpose. Hence the necessity of increasing such sales as rapidly as the lands can be sold for a fair price. Every dollar of interest derived from a sale of such lands decreases to that amount the sum necessary to be raised by taxation. It was clearly the duty of the legislature, therefore, by the enactment of just and proper laws, to encourage such sales and invite competition in order that the best possible price could be obtained.

It will be conceded that lands owned by the state are not taxable. May not the legislature provide that such lands shall not be taxable until the state conveys the legal title? This would not preclude the interest of the purchaser from being taxed, but would limit taxation to such interest. This is but justice, and tends materially to enhance the value of school lands. If the legislature may lawfully exempt the amount of the interest of the state in such lands as have been sold, but the title to which remains in the state, from taxation, may it not provide for the repayment of taxes levied upon such interest? There is no doubt of its authority to do so. The exercise of such power does not come within the inhibition of the constitution. While I fully concurred in the able opinion of the chief justice in the case of *Hagenbuck v. Reed* as a correct exposition of the language of the legislature, still the action of the legislature since that time in declaring that school lands are not taxable, and providing for the repayment of taxes paid thereon, is entitled to respectful consideration as tending to show the popular belief that such lands were not taxable.

The act for the repayment of taxes was passed in February, 1879, and an attempt seems to have been made

in the legislature of 1881 to repeal it, but although the bill passed the senate it was indefinitely postponed in the house. While these circumstances cannot be considered by the court in the determination of this case, they tend to sustain the defendant's plea that he purchased under the belief that the lands were not taxable. There is a clear distinction between the repayment of taxes levied upon lands owned by the state—upon property which the taxpayer did not own, which taxes, in the opinion of the legislature, were unjust, and a personal gift or donation. The record in this case is exceedingly meager. There is no copy of the assessment, nor does it appear what valuation was placed upon the land in controversy for any of the years for which taxes have been paid, and it is impossible to say from this record what taxes have been included in the judgment. In conclusion, we hold that the legislature may lawfully exempt the interest of the state in the school lands from taxation. In other words, if lands are sold at a given price, and one-tenth of the purchase price paid, the purchaser may be required to pay a tax upon his interest in the land and improvements, while the amount owing to the state may be exempt; and if the state may thus exempt such interest, it may provide for the repayment of such taxes.

It follows that the judgment must be affirmed.

JUDGMENT AFFIRMED.

LAKE, CH. J., dissenting.

I cannot concur with the majority of the court in their opinion in this case, but dissent for the following reasons:

They concede the fact to be, as it doubtless is, that when the taxes in question were levied and paid, the land upon which they were imposed was taxable. This concession accords fully with the unanimous decision of this court in *Hagenbuck v. Reed*, 3 Neb., 1, which is still pro-

fessedly adhered to, although at the same time practically nullified, because, as expressed in the above opinion, "the action of the legislature since that time in declaring that school lands are not taxable, and providing for the repayment of taxes paid thereon, is entitled to respectful consideration, as tending to show the popular belief that such lands are not taxable." Has it, indeed, come to this, that the highest court in the state, the one whose especial duty it is, under the constitution, to expound the law and enforce it, must conform its decisions, not to the law as it is, but to what "popular belief" would make it?

I have accustomed myself to suppose that the decisions of this court as to the meaning and effect of statutes were binding upon, and to be observed by, not only individuals, but every department of the state government, the legislature included. But in this it seems I was mistaken. In the case of *Hagenbuck v. Reed*, before referred to, wherein the taxability of school lands sold by the state but not yet fully paid for was squarely presented, the decision was that they were taxable, and the legislature, after this rule had been acted upon for more than six years, in the act referred to in the majority opinion, under a "whereas," declare that such lands "have not been, and are not now taxable for any purpose whatever." And to this unwarrantable, unconstitutional, and most offensive assumption, the court with exceeding humility responds, in a seeming apology for its former decision, that it "is entitled to respectful consideration," etc.

Well, the legislature having succeeded through the instrumentality of a "whereas" in formally reversing the settled rule that these lands were taxable, and thereby establishing the apparent illegality of the taxes that had been collected thereon, an excuse was afforded for directing a repayment. And doubtless some sort of excuse was necessary, for, without one, the scheme of tak-

ing money from the treasury and presenting it, not as a donation to any of the various public uses for which money may be appropriated by the legislature, but *as a naked personal gift*, which it was, might have been too manifestly unconstitutional to have been carried even in that legislature.

But, even if this excuse were something more than mere pretext, which, however, it is not, still I could not admit that the legislature had the constitutional right to impose the burden of repayment wholly upon those counties wherein the money was raised.

These taxes were levied in pursuance of, and for the various purposes specified in the general revenue law. A large portion was for state uses exclusively, in which all of the people of the state were equally interested, and to which they were bound to contribute in proportion to the taxable property which they possessed. Although the fact is not disclosed by the record, yet it is but reasonable to presume that, from time to time, as the yearly collections of taxes were made, the money was duly distributed by the treasurer, and has long since been expended for the several purposes to which the laws devoted it. This being so, I would like to know the principle by which the county wherein the money happened to be collected can be made liable for the portion that has gone to uses other than its own, to the exclusion of all the others. How, I ask, can the payment of a state debt, or obligation of any kind, be lawfully required of any less than the whole body of the people? Suppose, for instance, that it were now proposed to raise by taxation for exclusively state purposes an amount equal to the share that the state has used of the taxes realized from these school lands, could the legislature constitutionally levy the whole of it upon one county, or upon any number of counties less than the whole? Surely no one will so contend. But what is the difference in principle between

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such an imposition—taxation with a view to future expenditures—and one to satisfy an obligation growing out of an expenditure previously made? I can see no difference whatever, and therefore hold that, in either case, the burden should be laid, and can only be laid constitutionally, upon the whole of the taxable property of the state.

In support of my position on this point, I need only refer to certain provisions of the constitution which bear directly thereon, and of the effect of which there can be no reasonable doubt. Section 1, article IX., declares that: "That the legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct," etc. Section 4 of the same article provides that: "The legislature shall have no power to release or discharge any county, city, township, town, or district whatever, *or the inhabitants thereof*, or any corporation, *or the property therein*, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

This language is mandatory; it could not be more positive. It enjoins upon the legislature the duty of imposing the burdens of the state government upon all sections, and the people thereof, in proportion to the value of their taxable property. If a sum of money is to be raised for any state purpose, contribution must be required from all of the counties alike, and in proportion to the value of the taxable property therein, or these provisions of the constitution are violated. Therefore, if these moneys could lawfully be refunded at all, I am clearly of the opinion that the portion collected and used for state purposes should be borne by the state at large,

and cannot be, constitutionally, imposed upon the county of Washington alone.

But, it is equally clear to my mind that the legislature has no right to provide for the repayment of these taxes at all. As I have already shown, they were lawfully levied and collected, notwithstanding the incompetent and unconstitutional assertion of the legislature to the contrary. Their payment was but the satisfaction of a just debt due from the tax-payer as his constitutional share of the public burdens during the years for which they were levied, and from which the legislature had "no power," in the language of the constitution above quoted, "to release or discharge" him. Now, if there were no power in the legislature to release the party from the obligation to make the payment, with what reason can it be held that the money, when paid, may be restored to him? If such is to be the rule of construction, if these most valuable provisions of the constitution may be thus easily evaded, then indeed may it truthfully be said of that instrument that, in its strength, it is but "a rope of sand."

And there is still another reason, equally strong, why the legislature have not the authority to compel the county to pay over this money—to make this donation to the defendant in error. The only mode by which the necessary funds with which to do so can be obtained is, of course, by taxation. But it is well settled that taxation for a purely private purpose is unwarranted. That this purpose is private—that it is simply a gift in no way connected with the public welfare, is established by the fact that nothing is legally due from the county to him to whom the payment is directed to be made.

Speaking on the subject of taxation, Mr. Cooley, in his work on Constitutional Limitations, * 487, says: "Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an

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oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government." And at * 488: "An unlimited power to make any and everything lawful which the legislature might see fit to call taxation, would be, when plainly stated, an unlimited power to plunder the citizen." And again at * 490: "But we think it clear, in the words of the supreme court of Wisconsin, that 'the legislature cannot * * * in the form of a tax, take the money of the citizen and give it to an individual, the public interest or welfare being in no way connected with the transaction. The objects for which money is raised by taxation must be public, and such as subserve the common interest and well being of the community required to contribute.' Or as stated by the supreme court of Pennsylvania, 'the legislature has no constitutional right to * * * levy a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. No such authority passed to the assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interest or welfare, it ceases to be taxation and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them.'" See also *Freeland v. Hastings*, 10 Allen, 570. *Morford v. Unger*, 8 Iowa, 82. *Brodhead v. Milwaukee*, 19 Wis., 624. *Sharpless v. Mayor, &c.*, 21 Penn. St., 147. *Bristol v. Johnson*, 34 Mich., 123. Many more cases to the same effect could be cited, but I deem these sufficient upon a point so well settled.

These are the chief objections that I find to the affirmance of this judgment, and I deem them unanswerable. It is very much to be regretted that the views of the court on the points which I have thus discussed were not given in the majority opinion. It would certainly have been a source of great satisfaction to me as a member of the court, and I doubt not also to counsel who so ably presented them in argument, to have seen the reasoning by which they were overcome; to have been advised of the principle of constitutional law under which the legislature can nullify a solemn judgment of this court; and by which the people of a single county can be subjected to the payment of a state obligation, or taxed for a purpose purely private, and in no way connected with the public welfare. For these reasons I think the judgment should be reversed.

COBB, J.

While I concur in the judgment of affirmance in this case, I do not reach the conclusion to do so by exactly the same line of reasoning as that pursued by Mr. Justice Maxwell, to whom the writing of the opinion of the court was assigned.

It is true that in the case of *Hagenbuck v. Reed*, 3 Neb., 1, it was held that "lands donated to this state by the United States for school purposes, and which have been sold on credit, are subject to taxation, although the state has not actually parted with the legal title." I was a member of the bar at that time, and while then, as now, entertaining the most profound respect for the court as then constituted, I could not bring my mind to agree to the law or the wisdom of that opinion.

The levy of taxes, and sale of lands for the non-payment thereof, although made by county officers, are made in the name of the state, and derive their validity from state authority. If the statute quoted by the then

and now Chief Justice, in *Hagenbuck v. Reed, supra*, be construed to authorize the levy of taxes upon school lands bought on credit from the state, and upon which but a small per cent. of the purchase price had been paid, and to authorize the sale thereof for such taxes in case of their non-payment, then one of two things would necessarily follow: The law would authorize the sale of school lands at a price far below the minimum fixed by the constitution then in force, or it would authorize the issuance of a certificate of sale, and finally a deed for such land, which would bear a lie on their face, and become a "delusion and a snare" to the purchaser. It is scarcely possible that the legislature, in its keenest search for subjects of taxation, could have intended either of these results. And while the first is amply guarded against by constitutional prohibitions, there are provisions in the same revenue act which, to my mind, might well have excused the court in placing a construction thereon, avoiding the second.

The learned court, in the said opinion, lays considerable stress on the well known rule of construction that, "in giving a construction to a statute, we must, if possible, give effect to all its several parts." With this rule in view, it is quite remarkable that no construction is given to the language of the first sub-division of sec. 1 of the revenue law, enumerating property exempt from taxation, which is in these words: "First. The property of the United States and this state, including school lands." It seems to me that the opinion violates the rule above quoted in giving no effect to the words, "including school lands," in this sub-division. If the words, "school lands," as here used, are to be confined to the sixteenth and thirty-sixth sections, before they are sold on credit or otherwise, then why are they specially mentioned here, to the exclusion of the penitentiary, the capitol, and the saline lands? All of these lands were, in the first in-

stance, as clearly exempt from taxation as the school lands, and until sold they, as well as the school lands, were exempt under the preceding words, "the property of the United States and this state." The true and only answer, in my opinion, is to be found in this construction. The laws then in force, or enacted contemporaneously with the said revenue law, provided for the sale of the penitentiary, the capitol, and the saline lands, for cash down, and for the expenditure of the monies derived from such sales in the erection of a state penitentiary, state capitol, state hospital for the insane, etc., while the capital to be derived from the sale of the school lands was never to be expended, and its diminution, by any means, was solemnly forbidden by constitutional provisions.

In the case of the saline lands, for instance, upon the sale of a parcel of that the purchaser was required to pay for it down in full; if he failed to do so, it was declared no sale and the lands again offered, but upon payment being made a conveyance was executed therefor immediately, and thereupon it ceased to be saline land, was no longer the property of the state and was thereafter taxable. On the other hand, the law provided for a careful appraisement of the school lands, that the value thereof as fixed by the appraisers, if the same exceeded seven dollars per acre, should be the minimum price at which the same might be sold; but if such value should be fixed by the appraisers below that sum, then seven dollars per acre should be the minimum price at which such lands might be sold. The sale of such school lands was provided to be made on a credit of ten years, at a rate of interest which, although now the maximum legal rate, was at that time deemed very low. The law further provided for the leasing of the school lands, with certain exceptions and qualifications, for the term of twenty-five years, and provided further that "in case of the violation

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of any of the covenants in the contract furnished, by the lessee or purchaser, by the non-payment of moneys at the time specified in the contract, by the commission of waste upon the land, removal of any improvements thereupon from the land without the consent of the commissioners, the county treasurer shall notify the lessee or purchaser of his or her delinquency, and require the removal thereof by the fulfillment of the covenants of the bond and contract, and if such delinquency is not removed within thirty days, the lessee or purchaser shall yield possession of the premises to the state of Nebraska, and the property shall thereupon immediately revert to and be revested in the state; and the contract shall be dissolved, and the right of the lessee or purchaser, both legal and equitable therein be absolutely determined; and the prosecuting attorney of the district shall immediately, after receiving notice from the county treasurer of the violation of his or her covenants, by the lessee or purchaser of any school land, proceed against the person in possession of the premises involved, in the name of the people of the state of Nebraska for forcible detainer, and obtain restitution of the premises, in the same manner and with like effect as in case of tenants holding over."

I have quoted the above section for the purpose of showing that the law treated these lands, whether in the possession of lessee or of purchaser, exactly the same, and, as I think, still as *school lands* as well after the sale as after the leasing thereof. True, it speaks of the property reverting to, and becoming revested in, the state, which, it may be claimed, implies that it had passed out of the state; but this language is used in reference to the leased as well as to the purchased lands, and I think that it has never been claimed that the property in the leased lands has ever passed out of the state or that they were taxable.

I think that, construing all the provisions of these

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statutes together, the so-called sale and purchase of school lands on credit was, in legal effect, only a leasing of them with a privilege of purchasing by a full payment of the price, and in the contemplation and meaning of the first section of the revenue act, they remain *school lands* until the full price was paid over, and took the place of the lands in the permanent school fund.

12	371
27	155
12	371
30	186
12	371
52	293

VALENTINE LIPP, PLAINTIFF IN ERROR, v. JOHN A. HORBACH, DEFENDANT IN ERROR.

1. **Finding: JUDGMENT.** The finding of facts, and the judgment, must conform to, and be supported by, the allegations of the pleadings on which they are based.
2. **Contract to convey: ACTION TO ENFORCE FOR FUTURE.** The action was brought to enforce an alleged forfeiture against the purchaser of real estate for non-performance of the agreement on his part, and to foreclose his interest therein. The contract called for payment of the purchase money by four annual installments, payable respectively on the 20th of April, 1879, to 1882, inclusive. The action was commenced December 30th, 1879. The only default complained of respected the first installment, and a small arrear of taxes. Trial and judgment, March 19th, 1881; the finding being that the purchaser was in default as to the entire consideration, and the judgment conforming thereto. *Held*, erroneous.

ERROR to the district court for Douglas county. Tried below, before SAVAGE, J. The opinion states the case.

H. D. Estabrook, for plaintiff in error.

Kennedy & Gilbert, for defendant in error.

LAKE, CH. J.

This is a petition in error from Douglas county. Three errors are nominally assigned:

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First. That the petition fails to state a cause of action.

Second. That the amount recovered was too large; and,

Third. That the judgment should have been in favor of the plaintiff in error.

The record contains none of the evidence, therefore we can consider only those matters properly presented by the pleadings and judgment.

The facts set out in the petition, if they were established by the evidence (and we must presume they were), certainly entitled the defendant in error to some relief, even if not to the full extent which he obtained. Those facts are, in substance, that Horbach, in April, 1878, entered into a contract with Lipp to sell him the south half of lot six, in block six, in Horbach's 2nd Addition to Omaha, for the price of \$450.00, payable in equal installments in one, two, three, and four years, together with annual interest, and taxes. That in case of default by Lipp in making any of said payments of principal, interest, or taxes, it was agreed between them that "all rights of said Lipp which had accrued under said agreement should become forfeited," and he "should thence become the mere tenant at will" of said Horbach; "time being of the essence of said agreement." That, at the time of commencing the action (December 30th, 1879), Lipp had paid no part of either the purchase money, interest, or taxes, although there was then past due the installment of \$112.50 of the principal, and interest on the whole amount for one year, together with the taxes levied for the year 1878, amounting to four dollars and eighty cents, which Horbach had been compelled to pay. Indeed, according to the averments of the petition, Lipp had failed in every particular, at that time, to live up to the plain requirements of his contract respecting the payments that had then matured. Such being the case there can be no doubt that Horbach

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was entitled to an appropriate judgment in his favor. This disposes of the first and third objections raised by the petition in error.

But can this judgment be upheld? It appears to have been rendered on the 19th day of March, 1881, and the amount then found to be due, of "principal and interest, according to the terms of said contract," was "the sum of \$572.51, and for taxes assessed against said property, and paid by the plaintiff the sum of \$16.60," thus making a total of \$589.11, found to be Horbach's due, and which Lipp was decreed to pay by virtue alone of the cause of action above indicated. That the petition will not support such a judgment seems too plain to be questioned. As to the several annual payments, the only default complained of respected the first. It is true that, at the time of the trial, the installment of 1880 had also matured, but, it could not properly have been noticed unless brought into the case by a suitable supplemental pleading. This however was not done.

Now, even according to the terms of the contract, all that could possibly have been due to Horbach on the day of trial was the amount of the first two installments of principal and interest, falling due respectively in 1879 and 1880, together with such taxes as he had been compelled to pay in consequence of Lipp's neglect. The installment of 1881 was not due at the date of the judgment, and that of 1882, the last of the four, has not even yet matured, nor will it mature until the 20th of April next, notwithstanding which the court seems to have found that the entire consideration was then due, and rendered judgment accordingly. Under the allegations of the petition this was unwarranted. The judgment must therefore be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

12	374
28	51
12	374
33	275
12	374
31	584
12	374
46	706

HERMAN KERSENBROCK, PLAINTIFF IN ERROR, V. JOSEPH MARTIN, DEFENDANT IN ERROR.

1. **Replevin: MEASURE OF DAMAGES.** In an action of replevin brought by a mortgagee of goods against a sheriff holding them under an order of attachment in a suit against the mortgagor, the true measure of damages in favor of the sheriff, is the amount called for by the writ, where the value of the goods equals or exceeds that sum.
2. **Instructions to Jury.** In instructing a jury the judge should not give undue importance to the rights of one party, to the prejudice of those of the other. He should avoid expressing his opinion as to the effect of evidence, upon which it is the province of the jury alone to pass. Nor should he assume, and give the jury to understand, that there is a conflict in the evidence upon a matter in issue, when in fact there is none.

ERROR to the district court for Madison county. Tried below before BARNES, J.

It was an action in replevin commenced by the present plaintiff in error against the said defendant in error for the recovery of certain personal property. Plaintiff claimed title and right of possession by virtue of a certain chattel mortgage covering the property in question, executed by P. A. Sloan and Leopold Engler to the said plaintiff, Herman Kersenbrock, on the 26th day of March, 1880, which mortgage was duly filed in the county clerk's office of Madison county, Nebraska. The plaintiff, by his agent, Ferdinand Brodfuehrer, at the town of Madison, in said county, on the 19th day of April, 1880, took possession of said property by virtue of said mortgage, and while plaintiff so had possession of said property, the defendant, Joseph Martin, who was then sheriff of said Madison county, attached the same at the suit of Stubendorf & Company on a claim amounting to about \$400.00 against said Sloan & Engler, and interposed as his defense in his answer in this action, that said mort-

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gage was fraudulent as to creditors. The case was tried before BARNES, J. Verdict and judgment for defendant.

John G. Higgins and Byron Millett, for plaintiff in error, cited *Cropsey v. Averill*, 8 Neb., 151. Gen. Stat., 713. *Black v. Winterstein*, 6 Neb., 224. *Frey v. Drahos*, 7 Neb., 194. *Uhl v. Robison*, 8 Neb., 272. *Newton Wagon Co. v. Diers*, 10 Neb., 285. Wells Law and Fact, sections 466—477. Maxwells Pl. and Pr., forms of verdict in replevin.

Robertson & Campbell, for defendant in error, cited *White v. Webb*, 15 Conn., 302. *Hall v. Jenness*, 6 Kan., 356. *Phillipe v. Reitz*, 16 Kan., 400. *McCann v. McDonald*, 7 Neb., 305. *Armstrong v. Freeman*, 9 Neb., 14. *French v. Millard*, 3 Ohio State, 53. *Eisely v. Malchow*, 9 Neb., 181.

LAKE, CH. J.

This controversy is virtually between a mortgagee and certain of the creditors of P. A. Sloan and Leopold Engler. The defendant in error, who, as sheriff, seized the goods in controversy by virtue of an order of attachment, represents those creditors. There was a verdict and judgment for the defendant, and the plaintiff brings the case here by petition in error.

Of the several errors assigned, the ones chiefly relied on to obtain a reversal of the judgment relate to the judge's charge to the jury—the *first*, *third*, *fourth*, and *sixth* instructions given at the request of the defendant. These will be noticed in the above order.

By the first of these instructions the jury were told, in substance, that in case they found for the defendant the measure of his damages would be "the value of the property" replevied. Considering the attitude of the parties in respect to the goods this was very clearly error. As against the attachment debtors, the plaintiff, as mortgagee, was entitled to hold them. Before the levy of the

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attachment, the plaintiff, by his agent, with the assent of the mortgagors, had taken possession of all of the property, and was still holding it when seized by the defendant. His rights, therefore, were those of a mortgagee in possession, and even if, in consequence of fraud, they were found to be subject to those of these attachment creditors, he was entitled to all that remained after their just demands were satisfied. Those demands, as shown by the order of attachment, by which for the purposes of the replevin suit they are to be measured, were considerably less than the value of the property as shown by the evidence, and found by the jury. The recovery, therefore, should not have exceeded the amount called for by the writ. *Black v. Winterstein*, 6 Neb., 224. *Frey v. Drahos*, 7 Neb., 194.

The third instruction was in these words: "You can take into consideration all of the facts and circumstances shown by the evidence, and find from those facts and circumstances whether the plaintiff, or defendant, should, as matter of right and justice prevail, bearing in mind that Stubendorf & Co. are creditors of Sloan & Engler." We cannot think that this advice was calculated properly to inform the jury as to their duty in the application of the law to the evidence upon which they were called to pass. Again, it made altogether too prominent the fact of Stubendorf & Co. being interested in the result. Why this was done, we know not; probably it was through inadvertence, for surely the rights of Stubendorf & Co., as attachment creditors, were of no more importance, nor to be more carefully considered and guarded, than were those of the plaintiff as a mortgagee. Whatever the intention may have been, we think the tendency was to lead the jury to believe that, in the estimation of the judge, Stubendorf & Co. were entitled to special consideration. This instruction certainly was unfortunately worded, and ought not to have been given. In charging a jury undue

prominence should not be given to one branch or item of evidence, by particular mention, to the disparagement of the rest. *Markel et al. v. Moudy*, 11 Neb., 213.

By the fourth instruction the jury were told that: "A chattel mortgage upon a stock of goods in the manner, and under the circumstances that this chattel mortgage was given, casts a suspicion upon the transaction." This was clearly erroneous. The judge, it is true, did not say whether the suspicion thus cast was of good faith, or of fraud; we think, however, the latter was intended, and that most likely in that sense it was taken by the jury. The judge having assumed to himself the office of declaring the effect of the evidence, to a certain extent at least, instead of leaving it to be found by the jury, whose province it was, the plaintiff has just cause to complain. The question of fraud was one of fact, and it ought to have been left to the jury to find upon according to their own judgment unbiased by the opinion of the judge.

The sixth instruction was as follows: "If you find from the evidence that no note was ever given by Sloan & Engler to Herman Kersenbrock, as recited in the chattel mortgage, and that no equitable debt is secured by the said mortgage, then you will find for the defendant." By this the judge assumed that there was a conflict in the evidence respecting the actual existence of the indebtedness mentioned in the mortgage, when in fact there was none whatever. The fact of this indebtedness was shown by an abundance of evidence, and disputed by none. It ought not, therefore, to have been put to the jury to pass upon, but they should have been told to accept it as established.

It is also assigned for error, that the verdict is not supported by the evidence, but inasmuch as, for the errors above found, there must be a new trial, we will not consider that point.

REVERSED AND REMANDED.

12	378
22	87
12	378
33	758
19	378
32	485
19	378
34	404
12	378
41	262
12	378
43	155
12	378
50	863
19	378
57	753

I. E. DOTY, PLAINTIFF IN ERROR, v. SUMNER BROTHERS,
DEFENDANTS IN ERROR.

Judgment: FINDING. As to parties before the court, and respecting a matter within its jurisdiction, a judgment without a finding to support it is not void, but at most merely erroneous, and subject to reversal by a suitable proceeding for that purpose in a tribunal having authority to review it.

ERROR to the district court for Butler county. Tried below before Post, J.

The action was brought to enjoin defendants in error from the collection of a judgment which they had obtained against plaintiff in the county court, on the ground that it was defective in form. Action dismissed.

E. R. Dean, for plaintiff in error, cited *Demming v. Weston*, 15 Wis., 236. *Sprick v. Washington County*, 3 Neb., 255.

Matt. Miller, for defendants in error, cited *Freeman* on Judgments, sections 46-55. *Van Geazal v. Hillyard*, 1 Houston, 515. *Church v. Crossman*, 41 Iowa, 373.

LAKE, CH. J.

The claim of the plaintiff in error, that the judgment in question is void, cannot be sustained. The cases which he has cited do not support him in this position. That of *Demming v. Weston*, 15 Wis., 236, is only to the effect that, without a finding to warrant it, a judgment is erroneous, and will be reversed when subject to review by a proper proceeding. And the case of *Sprick v. Washington County*, 3 Neb., 255, really goes no further than this, although the language used is rather general.

As to parties before the court, and respecting a matter

Ex Parte Crawford.

within its jurisdiction, a judgment is not under any circumstances to be considered as a mere nullity, but as importing absolute verity, and of binding efficacy, until reversed by a competent appellate tribunal. Freeman on Judgments (2nd ed.), sec. 116. Jurisdiction being obtained over the person, and over the subject matter, no error in its exercise can make the judgment void. *Id.*, sec. 135, and cases cited. Although for want of a finding the judgment may be erroneous, and might have been avoided by a suitable proceeding instituted for that purpose, it is not void, and the ruling of the district court must therefore be affirmed.

JUDGMENT AFFIRMED.

EX PARTE JESSE CRAWFORD.

Crimes in Unorganized Territory. Unorganized territory attached to a county for "election, judicial, and revenue purposes" is, for such purposes, a part of such county, and the district court sitting in that county has jurisdiction over crimes committed in said unorganized territory. Jurors for the trial of such crimes should be summoned from both parts in suitable proportion, by the county commissioners, or if they fail in their duty, the court may summon a jury in the manner provided by section 664, Civil Code.

APPLICATION for writ of habeas corpus.

M. Kinkaid, for the application.

LAKE, CH. J.

This is an application for a writ of *habeas corpus*. It is made on the information of Jesse Crawford, who claims to be unlawfully deprived of his liberty by Barnabas Welton, who is sheriff of Holt county. The authority by

12	379
12	389
12	379
36	98
12	379
40	764

Ex parte Crawford.

which the sheriff assumes to hold the informant is fully set out, and the granting, or the withholding of the writ, must depend upon whether that authority is found to be lawful, or otherwise.

It appears that Crawford is under an indictment charging him with the crime of murder in the second degree, committed in that portion of the unorganized territory of the state lying directly west of Holt county. The indictment was found by a grand jury of that county during the present February term of the district court sitting therein. On his arraignment Crawford moved that the indictment be quashed, "because the court has no jurisdiction to try said offense." This motion was overruled, the case continued to the next term for that county, and the prisoner committed to jail, in charge of the sheriff, for safe keeping. This constitutes the deprivation of liberty complained of. Is it illegal?

By section 10, Art. VI. of the constitution, the unorganized territory west of the sixth judicial district is made a part thereof. This is supplemented by a legislative provision (section 146, Ch. 18, Comp. Statutes, 193), in these words: "All counties which have not been organized in the manner provided by law, or any unorganized territory in the state, shall be attached to the nearest organized county directly east for election, judicial, and revenue purposes," etc.

Now it so happens that directly west of Holt there is no organized county, it is still unorganized territory. Holt, therefore, is the nearest organized county directly east of this territory, and consequently the one to which, by force of the statute just quoted, it is attached for "election, judicial, and revenue purposes." As to these three purposes there are no restrictive or qualifying words in the act, but the attachment seems to be complete, and said territory to all intents made practically a part of that county. Indeed, this effect is made still more mani-

Ex parte Crawford.

fest, if that be possible, by reference to the next section of said act, which provides that: "The authorities" (of the county) "to which any unorganized county or territory is attached, shall exercise control over, and their jurisdiction shall extend to such unorganized county or territory, the same as if it were a part of their own county." The full extent of such jurisdiction and control can be correctly measured only by a resort to all of the various laws relative to county officers, and their duties respecting election, judicial, and revenue matters.

With these several provisions of constitutional and statutory law to guide us, we cannot hesitate to hold, not only that the district court, when sitting in Holt county, has jurisdiction to try the prisoner for the crime charged, but that, unless through a change of venue made at his request, he can be lawfully tried in no other.

It does appear, however, that the judge of the sixth district, pursuant to the act of February 24th, 1879, entitled: "An act to authorize the judge of the district court to designate the county in which an indictment may be found," etc., Comp. Stat., 737, section 489 a, by order designated Holt county as the one wherein the offense might "be inquired into by the grand jury," etc. But this order was of no effect. It added nothing to the inherent authority of the district court for that county, under the law, to indict, try, and punish for all crimes committed in the trial district, composed, as before shown, of Holt county proper and the unorganized territory attached thereto for judicial purposes.

There is another matter mentioned by counsel as tending in his estimation to show a want of jurisdiction in said court to proceed with the trial of the prisoner. This is the supposed impracticability, as the law now stands, of procuring a legal jury. It is doubtless the right of the accused to insist that the jury be called from the trial district—the district in which the offense is alleged to

Bennett v. Rogers.

have been committed. This right the constitution secures to him. *Olive v. The State*, 11 Neb., 1. The difficulty here suggested is, we think, more fanciful than real. There is ample provision in the statutes for obtaining a jury of the character called for by the constitution. The county commissioners, whose duty it is to select the list of persons from which the panel must be drawn, are, as we have seen, invested with precisely the same authority over the unorganized territory where this crime was committed, as they have over Holt county proper. Holt county, together with the unorganized territory belonging thereto, being one trial district, the commissioners, in making the selection of jurors, should draw from both parts in suitable proportion. If, however, they omit their duty in this respect, and in consequence thereof the panel is illegal, the court may quash it, and through the instrumentality of its own process, directed to the sheriff, procure one that is legal, as provided in section 664, Gen. Statutes. We are of the opinion, therefore, that the prisoner is lawfully in the custody of the sheriff, and that the writ must be denied.

WRIT DENIED.

12 889
32 686

J. S. BENNETT AND OTHERS, PLAINTIFFS IN ERROR, v. C.
M. ROGERS AND OTHERS, DEFENDANTS IN ERROR.

Contract: PRIORITY: EVIDENCE. The question for the jury turned upon the priority in point of time of the two independent contracts for the purchase of a field of standing corn. Plaintiffs' testimony proved a purchase "between the 18th and 25th of September." Defendants' testimony proved a purchase on the 19th of the same month. *Held*, that the plaintiff failed to establish his case.

ERROR to the district court for York county, where the

cause had been brought on appeal from the county court. The action was brought in that court by Rogers *et al.*, against Bennett *et al.*, to recover the value of eleven acres of corn, alleged to have been converted by said Bennett *et al.* to their own use. Both parties claimed the corn by purchase from one Dodge, the plaintiffs by purchase between the 18th and 25th of September, the defendants by agreement on the 19th of September, made between Bennett, agent for Ferguson, who owned the land, and Dodge, tenant, by which the latter turned over the corn for rent due. Verdict and judgment in county court, and in district court on appeal, before Post, J., for plaintiffs, and defendants there brought the cause up on a petition in error.

France & Sedgwick, for plaintiffs in error.

Montgomery & Harlan, for defendants in error.

COBB, J.

The plaintiffs in error present two points.

First. That the verdict is not sustained by the evidence.

Second. That the court erred in its instructions to the jury.

There is little or no conflict in the testimony. There can be no doubt that Dodge sold the corn to the defendants in error, nor that he turned the same out to Bennett, one of the plaintiffs in error, in payment of the rent of the ground upon which it and other crops were raised. The question is, which was prior in point of time. The transaction being equal in good faith and consideration on the part of the parties to the suit, preference must be given to the one having precedence in point of time, if that can be ascertained. The evidence in support of each transaction is entirely independent of that in support of the other, and neither casts the least discredit upon the

other. The corn was standing in the field, and so not susceptible of that manual delivery which usually follows the purchase of chattels.

The defendants in error were both sworn as witnesses on their own behalf at the trial. They both testified to the purchase by them of the corn from Dodge, sometime between the 18th and 25th of September. Neither of them pretends to fix any point of time between those two dates for the transaction, although closely pressed by counsel to do so. There was other testimony on the part of the plaintiffs below, all of which tended to corroborate them, but shed no light upon the only point of difficulty in the case.

The plaintiff in error, Bennett, as a witness on behalf of defendants below, testified that, being agent for the owner of the land on which the corn and other crops were raised, Dodge came to him at his office in Waco, on the 19th of September, and turned out the corn to him, to secure the rent, and that two or three—not to exceed three—days afterwards he went to look at the corn, and at this time the corn was shown and pointed out to him by Dodge.

Whether we consider the transaction of turning out the corn on the rent as consummated at the time of the interview between Bennett and Dodge, at the office of the former, on the 19th, or at that at the field, two or three—not to exceed three—days later, in either case preference in point of time must be given to it, over that of the purchase, "between the 18th and 25th," by the defendants in error.

The defendants in error were the plaintiffs in the court below; they charged the defendants, plaintiffs in error, with having taken and converted their property. To establish their case, they prove that they became the owners of the property at some point of time between the 18th and 25th of September. There can be no doubt of the rule, that where proof as well as pleading is of a doubt-

ful or equivocal character, it must be construed least favorably to the party offering it. So this proof of the defendants in error must be construed, and should have been construed by the jury, as proving that the defendants in error made their purchase on the 25th of September. The evidence of the plaintiff in error, the party holding the negative of the proposition in the court below, is positive in its character; does not depend upon construction, and shows a purchase, or what we must hold to be equivalent to a purchase, on an earlier day.

In an early case, *Brown v. Hurst*, 8 Neb., 353, this court laid down the rule, that: "A verdict will not be set aside merely because the court is inclined to differ with the jury upon the weight of the evidence; but it should appear to a reasonable certainty that injustice has been done to the party complaining, by the failure of the jury to give the whole testimony its proper weight in determining the question submitted to them, otherwise the verdict ought not to be disturbed." This rule has been uniformly adhered to in the many cases involving its consideration which have since come before this court, and it will not be departed from. But the evidence in a law suit, like a line of battle, or a chain of military defenses, is "no stronger than its weakest point;" and so, where there is a point entirely undefended, it may be said that there is an entire failure of evidence.

In considering the first point, having come to the conclusion that there must be a new trial, the second point will not be considered.

The judgment of the district court is reversed, and the cause remanded.

REVERSED AND REMANDED.

12	386
32	422
12	386
46	68
12	386
48	873
12	386
50	520
53	435
12	386
60	112
12	386
61	506

THE STATE OF NEBRASKA, PLAINTIFF IN ERROR, v. JACK
PAGE, DEFENDANT IN ERROR.

1. Title to act: CONSTITUTIONAL LAW. A title to an act of the legislature in these words—"Counties and county officers," is not open to the constitutional objection of containing more than one subject.
2. ———: ———. An act, complete in itself, may so operate on prior laws as to materially change or modify them, without being repugnant to the constitution.
3. Counties attached for judicial purposes: DRAWING JURIES. When an unorganized county is attached to an organized county for judicial purposes, the two constitute a single trial district, and the list of persons selected by the county commissioners from which jurors are drawn must be taken in due proportion from all of the precincts of both.
4. ———. If such list be not legally formed, the court may provide a lawful jury as directed in section 664, Comp. Statutes, 618.

THIS was a bill of exceptions, filed by the district attorney, to take the opinion of this court upon points which are in the trial below, before GASLIN, J., and ruled in favor of Page.

V. Bierbower, District Attorney, and C. J. Dilworth, Attorney General, for the state.

William Neville and George W. Heist, for defendant in error.

LAKE, CH. J.

The questions to be considered are presented by a bill of exceptions taken by the district attorney of the fifth judicial district under section 483, and brought here for review as provided by section 515 of the criminal code. It appears that Page is under an indictment found by the grand jury of Cheyenne county for the crime of murder, alleged to have been committed in the unorganized county of Sioux. By section 146, Sioux

county is attached to Cheyenne "for election, judicial, and revenue purposes. Comp Stat., 193.

To this indictment Page interposed a plea in abatement, in which, among other things, he alleges:

First. That the act attaching Sioux to Cheyenne county is "unconstitutional and void," and that, consequently, the former still remains "in the sixth judicial district," where it was placed by sec. 10, Art. VI., of the constitution.

Second. That the list of persons from which the grand jurors that found the indictment were drawn, was composed wholly of residents of Cheyenne county, although, at the time of the selection, there were in Sioux county at least two hundred persons possessing the qualifications of jurors, and who still resided there when the indictment was found. That of the whole number of persons in both counties qualified to act as jurors, one-third were residents of Sioux, and yet not a single one was called therefrom. A general demurrer to this plea was overruled, an exception to the ruling taken, and this is the basis of the alleged errors.

Is this plea a sufficient answer to the indictment? As to so much of it as challenges the jurisdiction of the court by alleging the unconstitutionality of the act by which the unorganized county of Sioux was detached from the sixth judicial district and attached to the fifth by joining it to the organized county of Cheyenne, we answer in the negative. It is contended in support of this part of the plea that the act embraces more than one subject, which the constitution forbids. The title to the act is: "Counties and County Officers." There is nothing in the act foreign to this title. Where a law has but one general object, as is clearly the case with this one, and the title fairly expresses it, that will satisfy the constitutional requirement here invoked. *White v. The City of Lincoln*, 5 Neb., 505.

It is further claimed that, inasmuch as the effect of attaching Sioux county to Cheyenne is to change the former boundaries of the fifth and sixth districts, the act is also open to the constitutional objection of containing a subject not "expressed in its title." We cannot so hold. This is a complete act of itself. The title is couched in general terms, and is exceedingly comprehensive. It cannot in reason be said that the provision in question is not germane to the title, and we must hold it to be constitutional. An act complete in itself may so operate on prior laws as to materially change or modify them, without being repugnant to this provision of the constitution. *Smails v. White*, 4 Neb., 853.

It follows from this that, for all of the various purposes of judicial administration, these two counties, thus united, constitute a political entity—a single trial district,—over which said court, when sitting in the organized portion thereof—Cheyenne—has complete jurisdiction, both civil and criminal. For such purposes the two counties together are to be regarded as if the entire territory covered by them were but one.

As to the remainder of the plea, however, the portion showing that, in the selection of jurors, Sioux county was disregarded, and the list made up exclusively from residents of Cheyenne, our conclusion is that it constitutes a sufficient answer to the indictment, and that the demurrer was, therefore, properly overruled. The prisoner has the right to insist that the list of persons from which the panel is drawn be filled in due proportion from all of the precincts within the trial district, and not from a part only. The constitution guarantees to him this right. *Olive v. The State*, 11 Neb., 1. In this case the county commissioners, in the preparation of the list from which the jury was drawn, overlooked a precinct containing one-third of the whole number of persons in the trial district qualified to serve. This rendered the jury drawn

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therefrom an illegal body, and the indictment against the prisoner fatally defective. The commissioners must make the selection from the whole number of precincts in the trial district, whether such district be composed of a single county, or of additional territory also, united, as in this case, for judicial purposes, as provided in section 658, Comp. Statutes, 617. If the list be not legally formed, the court has ample authority to provide a lawful jury under section 664, Comp. Statutes, 618. *Ex Parte Crawford*, ante page 379. For these reasons the ruling of the district court as to the sufficiency of the plea in abatement must be sustained.

JUDGMENT AFFIRMED.

PHILIP DECK, PLAINTIFF IN ERROR, v. EMELINE SMITH, DEFENDANT IN ERROR.

12	389
18	388
17	363
18	583
20	94
19	389
20	246

1. **Replevin: DAMAGES RECOVERABLE ON APPEAL: PRACTICE.**

In an action of replevin properly brought before a justice of the peace and appealed to the district court, if the ends of justice require it, as where by an increase in the value of the property pending the appeal it exceeds the jurisdiction of the lower court, the appellate court, by amendment, may permit an increase of the alleged value, and a recovery may be had accordingly.

12	389
51	257
51	267

2. ———: ———: **CONVERSION.** Where property has been delivered to the plaintiff at the commencement of the action under an order of delivery issued by a justice of the peace, who, on the trial, decides in favor of the defendant, and orders a return, from which an appeal is duly taken to the district court, if between the entry of judgment by the justice and the perfection of the appeal, the defendant take and convert the property under the same claim of right, such conversion may be shown as a means of estimating the damages.

3. **Married Women.** Personal property, the proceeds of money derived by the wife from her father's estate in 1854, in the state of New York, and which she and her husband, in good faith,

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have at all times treated and regarded as exclusively her own, although it may have been in their joint possession, and he may have exercised such acts respecting it as under the common law would have amounted to a reduction of it to his own possession, and rendered it liable for his debts, is, nevertheless, by the act of 1871, relative "to the rights of married women," secured to her against any indebtedness of her husband to which she is in no way individually answerable.

4. —. The fact that the husband was accustomed to list the property for taxation as his own, is not conclusive on the question of ownership; it is at most only evidence proper to be submitted to the jury on that question.

ERROR to the district court for Lancaster county. Tried below before POUND, J. The opinion states the case.

L. C. Burr, for plaintiff in error.

1. The court had no jurisdiction. *Bickett v. Garner*, 21 Ohio State, 659. *Wood v. O'Farrell*, 19 Id., 427. *Dowling v. Stewart*, 3 Scam., 194. Gen. Stat., 692, §1039. *Galley v. County of Tama*, 40 Iowa, 49. *Gates v. Neimeyer*, 54 Iowa, 110.

2. There was error in allowing the evidence to go to the jury, in showing that after the property was taken in replevin, and a subsequent execution was issued and certain property taken on that execution, and no supplemental petition filed. Nothing done in the last execution could be material or competent, and yet the court says in his instructions to the jury, "and as it appears from the evidence that since this action was commenced said property was taken and sold by the defendant," seems to us to be clearly misleading the jury, and error on the part of the court. *Ingraham v. Martin*, 15 Me., 373.

3. The evidence shows that husband had reduced property to possession, exercised acts of ownership over it, etc., listed it for taxation in his own name. The judgment ought to be in her favor, and is clearly against weight of testimony and instructions. *Stanton v. Kirsch*,

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6 Wis., 338. *First National Bank v. Bartlett*, 8 Neb., 329. Gen. Stat., 465.

M. H. Sessions, for defendant in error, cited *Tindall v. Meeker*, 1 Scam., 139. *Cropsey v. Wiggernhorn*, 8 Neb., 108. Comp. Stat., 646, § 1010. *Dressler v. Davis*, 12 Wis., 58. *Pelt v. Pelt*, 19 Wis., 193. Comp. Stat., 401, § 7. *Fuller v. Alden*, 23 Wis., 301. *Knapp v. Smith*, 27 N. Y., 277. *Buckley v. Wills*, 33 N. Y., 518. *First National Bank v. Bartlett*, 8 Neb., 327.

LAKE, CH. J.

This is a proceeding in error to obtain a reversal of a judgment of the district court for Lancaster county. The judgment was in an action of replevin brought into that court by appeal from a justice of the peace. The property replevied was four yearling heifers and twelve hogs. The plaintiff in error, a constable, from whom the property was replevied, had seized it in execution of a judgment against W. H. Smith, the husband of the defendant in error, and as belonging to him.

It is first objected to the judgment that the district court acquired no jurisdiction of the subject matter of the suit by the appeal. This claim is based solely on the ground that the value of the property as alleged in the petition, and found by the jury, exceeded the jurisdiction of a justice of the peace. It appears that the alleged value was increased from one hundred dollars before the justice to one hundred and thirty dollars in the district court. The value, as finally found by the jury, was one hundred and thirty-eight dollars and seventy-five cents. This, it is contended, shows a departure—a new or different cause of action from that brought before the justice of the peace. It is not claimed that the property described in the petition in the district court was any other than that mentioned in the bill of particulars before the justice, and which was actually replevied. There

was, therefore, no departure in this respect. Nor is it claimed that the justice was without jurisdiction to render the judgment appealed from. Therefore, the jurisdiction of the justice over the subject matter being conceded, it follows necessarily, that the district court, by virtue of its general appellate power, was authorized to hear and determine the case *de novo* on the appeal.

While it is doubtless true that, in the appellate court, no new cause of action could be properly introduced, nor damages for the unlawful detention of the property in excess of the amount recoverable before the justice, together with a proper allowance for the delay caused by the appeal, be lawfully claimed, it is not true that the natural increase in the value of the property, to whatever extent it went, might not have been both claimed and recovered, where a return, when ordered, could not be had. To hold otherwise might result in the most flagrant injustice. Take, for example, this very case, where the property in controversy, or the most of it, is shown to have been young stock, which, from its natural growth alone, was probably increasing quite rapidly in value, it is not at all likely that the value in November, 1878, when the case was tried before the justice, was the true measure of the value in March, 1880, when the trial came off in the district court. The plaintiff in error having so disposed of the property pending the litigation that a return could not be had, justice could be done only by requiring of him its value, as the statute in such cases directs. Code, sec. 191 *a*, Comp. Stat., 554. The district court having obtained jurisdiction of the case by the appeal, it not only had authority, but it was its duty to so rule as to do as complete justice between the parties as possible. And if to do this it became necessary to increase the amount claimed, there is no rule of practice preventing it being done. Indeed, such a course is fairly within the contemplation of the code, as by the following provisions is

clearly shown—by section 1010 which provides that in cases appealed to the district court “the parties shall proceed in all respects in the same manner as though the action had been originally instituted in the said court;” and by section 144, which confers upon the court an almost unlimited power of amendment “in furtherance of justice.” *Dressler v. Davis*, 12 Wis., 58, fully sustains us in this view.

It is also claimed that it was error to permit the plaintiff below to show a conversion of the property by the defendant during the pendency of the action. The property had been taken and delivered to her under the order of replevin. Afterwards the defendant again seized and sold it under the same judgment. His rights under the last seizure were not different from those under the first one. Indeed, the sale seems to have been made directly in violation of the plaintiff's rights during the litigation. It is true that the justice had decided the case against her, and ordered a return of the property to the constable, who took it the second time between the date of this judgment and the giving of the appeal undertaking. But the appeal was perfected in due time and before the sale took place. Thereupon the officer should have returned the property to her, if he would successfully have guarded himself against a judgment for its value in case of defeat in the appellate court. Under the circumstances it was necessary for the plaintiff to show what had become of the property in order to recover its value. Without this showing—the property having been delivered to her at the commencement of the action—she would have been entitled only to damages for its detention, which, probably, would have been but little if anything more than nominal. There is no error in this particular.

The third and only remaining point to be considered relates to the charge to the jury. It is contended that the first, sixth, ninth, tenth and eleventh instructions

Deck v. Smith.

requested on behalf of the plaintiff in error ought not to have been refused.

Mrs. Smith's claim to the ownership of the property was, as the evidence tends to prove, substantially this: Soon after her marriage in 1853, in the state of New York, she received from her father's estate between two hundred and fifty and three hundred dollars in money. This money and the proceeds therefrom, through various investments, she has, with the assent of her husband, continued to hold and manage as her own individual property down to the present time. That the property in controversy was derived from that source. She with her husband removed to this state in 1869, where they have since resided. The testimony, although somewhat conflicting, will sustain this claim.

The first of the instructions refused was to the effect that if "the property by means of which the property in question was acquired, was in the possession of the plaintiff and her husband" prior to the taking effect of the act of 1871, relative "to the rights of married women, then the jury should find for the defendant"—the constable. The idea embodied in this request seems to be that, inasmuch as Mrs. Smith received this inheritance when by the law her husband was entitled to become the owner by reducing it to his possession, she could not hold it as against his creditors under the act just referred to. But even if it were conceded that the personal estate inherited from her father by Mrs. Smith was liable for the satisfaction of her husband's debts prior to the act of 1871, it would by no means follow that such liability would continue after that act took effect, and as to debts subsequently contracted by him. This instruction was really inapplicable to the evidence before the jury and the conceded facts of the case. The indebtedness, for the satisfaction of which the property was seized, was not contracted until May, 1876. It was contracted in this state,

and consequently with especial reference to her marital rights under the then existing laws. Although the husband might possibly have performed acts which, under the rule of the common law, amounted to a reduction of the property to his possession, still, if upon coming to this state in 1869, and thence forward, he has made no claim to it, but both he and his wife in good faith have regarded and treated it as her own, the act of 1871 will protect her in its enjoyment as against any indebtedness of her husband to which she is in no way individually answerable.

The sixth instruction was to the effect that if the jury found that the husband of the plaintiff was the owner of the property, then they should find for the defendant. The substance of this request had been given by the court on its own motion, and it was unnecessary to repeat it. Therefore the refusal to give it was not error.

The ninth and tenth requests relate to the conceded fact that the husband had been accustomed to list the property in question for the purposes of taxation, as his own. It is contended that, if this were done with the wife's knowledge and consent, it was such an act of ownership as would effectually estop her from asserting it afterwards. We cannot so hold. At most it would only be evidence proper to go to the jury as tending in some degree to establish ownership in the husband, and to be given whatever weight upon that question they believed it entitled to receive. Very clearly it should not preclude the wife, if she be the real owner, from asserting and showing her right to it.

The eleventh request does not differ in principle from the first, which we have sufficiently considered. It needs, therefore, no separate or further notice.

We will only add respecting the charge as a whole, that it was quite as favorable to the plaintiff in error as

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the evidence and the law of the case would warrant. We discover nothing in the record of which he can justly complain. The judgment must be affirmed.

JUDGMENT AFFIRMED.

THE B. & M. R. R. Co. IN NEBRASKA, PLAINTIFF IN ERROR, v. THE BOARD OF COUNTY COMMISSIONERS OF SALINE COUNTY, ET AL., DEFENDANTS IN ERROR.

1. **Taxation: ASSESSMENT: RETURN.** The failure of assessors to return their assessment rolls to the county clerk, within the time required by the statute, is a mere irregularity and does not invalidate the tax.
2. ———: ———. Accidental omissions of property from the assessment roll, or omissions purposely made under a mistake of law, and in the belief that the omitted property is not taxable, is no ground for enjoining the collection of taxes upon other property which is assessed.

ERROR to the district court for Saline county. Heard below before WEAVER, J.

T. M. Marquett, for plaintiff in error.

Hastings & McGintie and *W. H. Morris*, for defendants in error.

LAKE, CH. J.

This action was brought in the district court to enjoin the collection of certain taxes levied for the year 1877 upon the property of the railroad company in Saline county. The petition was demurred to, the demurrer sustained, and the question here is whether the facts alleged constitute a cause of action.

The first point made against these taxes in the petition

is, that the assessment rolls for that year were not returned by the several assessors to the county clerk by the second Monday in April, as the statute requires. This omission to comply literally with the terms of the law was but a mere irregularity which in no wise affected the levy. In this particular the statute is only directory. *Williams v. School District*, 21 Pick., 75.

The next point made is, that the assessment was invalid in this, that the valuation of agricultural lands was made upon the statutory basis, whereby certain improvements were exempted from taxation which by the constitution had been prohibited. Under the law, as it stood at the adoption of the constitution of 1875, assessors were required not to value such lands any "higher by reason of any improvements thereon made exclusively for agricultural purposes, unless such improvements exceeded the sum of one thousand dollars," in which case such excess only should be considered. Sec. 4, chapter 66, Gen. Stats. This rule the constitution abrogated.

It is not alleged that either the assessors, or the county commissioners, in what they did in this particular acted in bad faith. In "following or attempting to follow the statute," as the petition charges them with having done, they doubtless supposed themselves to be strictly within the line of official duty, and although it is now discovered that they were not, by reason of which a large amount of taxable property was not assessed and therefore escaped taxation, it furnishes no excuse for exempting that which was assessed. Doubtless one effect of this mistake was—as we took occasion to say in *B. & M. R. R. Co. v. Seward County*, 10 Neb., 211—to increase somewhat the rate of the levy upon property placed on the tax duplicate for that year beyond what it would have been under a proper valuation. In that case we held that a like mistake was not a sufficient ground for enjoining a tax upon other property otherwise legally imposed.

Matthews v. Sowle.

Watson v. Inhabitants, etc., 4 Met., 599. *Insurance Co. v. Yard*, 17 Penn. St., 311.

We are of opinion that the petition fails to state a cause of action, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

BENJAMIN L. MATTHEWS, APPELLEE, v. WILLIAM H. SOWLE,
CELIA SOWLE AND HANNAH TIBBETS, APPELLANTS.

1. Principal and Agent: SALE BY AGENT. An agent employed for a *special* purpose derives from this no general authority from his principal. If such an agent exceed his authority the principal is not bound.
2. ———: ———. Where an agent with only special and limited authority to sell a tract of land for a fixed price in case he could sell it "*immediately*," answered by letter that he could not sell it for that price, and requested permission to sell for considerably less, or if that were not given to "*let the matter drop*;" and afterwards, without any further communication with the owner of the land, sold it for the price at which it was first offered; *held*, That the sale was unauthorized and not binding upon the principal.

APPEAL from the district court of Jefferson county. The action was brought in that court to enforce the specific performance of an alleged contract for the sale of a tract of land in that county. The contract was as follows:

This contract made and entered into this 14th day of February, 1880, by and between W. H. Sowle of Los Angeles, California, party of the first part, and B. L. Matthews of Fairbury, Nebraska, party of the second part. The party of the first part agrees to sell to the second party for the sum of fifteen hundred dollars the following property situate in Jefferson county, Nebraska, to-wit: The south half of the south-east quarter of section six, town 1, range 2 east, and the north half of the

Matthews v. Sowle.

north-east quarter of section seven, town 1, range 2, east, all in Jefferson county, Nebraska. And the second party agrees to buy the said place at said sum. Said sum of money to be paid in cash down upon the first party executing and delivering to said second party a good and sufficient conveyance therefor. The first party agrees within a reasonable time to execute and deliver said conveyance to said second party.

Witness our hands this the day and year last above written.

W. H. SOWLE, by
W. H. SNELL, Agt.
B. L. MATTHEWS, by
A. W. MATTHEWS, Agt.

Endorsed on the back: "Fairbury, Nebraska, Feb. 14th, 1880. Rec'd on the within contract the sum of \$500."

W. H. SOWLE, by
W. H. SNELL, Agt.

On the same day there was paid on said contract the sum of \$500, and plaintiff took possession of the premises. Afterwards, and before commencement of this suit, he tendered the balance of purchase price, \$1,000.00. The defendants all denied that Snell was their agent with power to bind them by contract, or that A. W. Matthews was the agent of the plaintiff with authority to bind him by the contract. They further allege that prior to the alleged sale to plaintiff, there was a bona fide sale of the land in controversy by Wm. H. Sowle and wife to the defendant, Hannah Tibbets, and this last named defendant, besides her answer, filed a cross bill asking that the pretended sale to plaintiff may be declared null and void, and for other relief. Trial had before WEAVER, J., and decree for plaintiff. Defendants appeal.

S. N. Lindley (Marquett, Deweese & Hall with him),
for appellants.

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1. The contract must be clearly proved. 2 Story's Equity, 751, 764. Pomeroy on Contracts, sec. 186.

2. There can be no contract unless the parties thereto assent, and they must assent to the same thing in the same sense. 1 Parsons on Contracts, 399, 400, 401, 402. *McCotter v. Mayor*, 37 N. Y., 325. *Trevor v. Wood*, 86 N. Y., 307. *Brittain v. Phillips*, 24 Howard, N. Y., 171. Pomeroy on Contracts, sec. 64. Even when parties think they have agreed and made a contract, if, in fact, they at the time of its execution intended it in a different sense, there is no contract. *Scranton v. Booth*, 29 Barb., 171. *Baldwin v. Mildeberger*, 2 Hill, 176. Still further, if, instead of rejecting, Snell had *accepted* the offer, yet, if he ended by asking the plaintiff's assent, as he unquestionably does, there is no contract till the assent is obtained. *Hough v. Brown*, 19 N. Y., 111. Pomeroy on Contracts, sec. 68 and notes.

3. If there was no contract then there could be no partial performance. The alleged payment of \$500 and the possession taken by A. W. Matthews with the assistance of Snell under such very suspicious circumstances of haste count for nothing. Pomeroy on Contracts, sec. 115. *Philips v. Thompson*, 1 John. Ch., N. Y., 181. *Parkhurst v. Van Cortland*, 1 John., 273. *Lord v. Underdonk*, 1 Sand. Ch., 579. Payment of the consideration will not cure a contract which is not in itself complete and valid at law. *Rhodes v. Rhodes*, 3 Sand. Ch., 279. *Sites v. Keller & Skinner*, 6 Ohio, 489. *Blanchard v. McDougal*, 6 Miss., 165. *Knoll v. Harvey*, 19 Miss., 111. *Wagoner v. Booger*, 3 Met., 209.

Slocumb & Hambel and *W. H. Snell*, for appellee, argued mainly from the evidence alone to support the decree below, contending that Snell was the general agent of W. H. Sowle, with respect to everything pertaining to the land and especially for the purpose of making a sale of it on terms most advantageous to Sowle;

that at *no time* did it appear that said Snell *ever refused, or declined* to act as agent for the sale of the land; that Snell's letters referred to, as containing a "prompt and emphatic refusal" on his part to act as such agent, was *of itself* corroborative testimony showing that he accepted the agency and was using his utmost endeavors in the interest of Sowle to sell the land; and in that letter reported an offer to Sowle of \$1,300, as he had no authority himself to close a sale for less than \$1,500 without Sowle's consent.

LAKE, CH. J.

In our view of this case the judgment of the district court cannot be upheld. The principal question presented, and the one on which our decision must turn, is as to the authority of W. H. Snell to make the alleged sale. If such authority were conceded, or could reasonably be found from the evidence, we should not hesitate upon the other points to uphold the sale and affirm the judgment. There is no ground for claiming that Snell was the general agent of the defendant. As to the land in question, in the matter of selling or negotiating a sale of it, his agency was special and depended entirely upon the approval of his principal. Snell's own letters to Sowle, as well as those written in answer, show this to be so. With this understanding of the relation of Snell to the owner of the land, a correct solution of the question of authority is not, as it seems to us, at all difficult.

It is claimed that authority to make the sale is sufficiently established by a letter written by Sowle to Snell, of which the following is a copy:

LOS ANGELOS, CAL., Jan. 19th, 1880.

MR. SNELL—*Dear Sir:* Received your letter of Jan. 6th, 1880. Mr. Crisp wrote me that Mr. Saxon would prosecute J. N. Thompson and others, if any, for stealing timber, and collect rents, etc., for the sum of \$25. I told Mr.

Crisp to get the rent and employ Mr. Saxon and pay him the \$25. But it seems by some means Mr. Saxon was not employed, and that you have been employed in his stead. I'm very ignorant so far and would like to know and must know the particulars. Have you received the \$25 from Eli C. Crisp? If not, what will your charges be? I want to know in particular who it is that wants to buy the place. There is several parties here who are dissatisfied with this country and are going back to Nebraska in the spring, as they have disposed of their property here, and they say, that they would rather have twenty-five acres of my land, as 1,000 acres here to farm, if it is as good as I represent it. But I suppose it would not show to an advantage, like it did, when I left there. Rather than to trouble myself any more about the place, and that my business here is much more important, and after reflecting upon the matter, I have concluded to take \$1,500, fifteen hundred dollars, and if it can be sold for said sum do so, if not, I shall come back immediately and look into the matter thoroughly, or I will sell it to my sister, Mrs. Tibbets, then she will look into the matter more particularly than I do. I have not heard from Crisp for three months, though I have written to him several times. Answer immediately.

W. H. SOWLE,

Much of this letter relates to matters other than the proposed sale, but we regard the whole of it as valuable, tending as it does to show the brief business connection between these parties, and their true relation to each other respecting the land. The letter was written in answer to one from Snell, under date of January 6th, in which he said he "could get \$1,800 for the place," and asked if he might sell it for that sum. If upon the receipt of this letter, to which an answer was required *immediately*, Snell had made a sale for the proposed price thus sent to him, undoubtedly Sowle would have been

bound by it. But he did not do so. On the contrary he refused to act upon the offer in the most unqualified terms, as is shown by the following extract from his letter written in reply, dated January 27th, 1880. "I can get you \$1,800 for your place, and that is all I can get. If you don't take this and take it now, I don't know that I can ever get it. It is bound to be sold some time to pay off the debts, and if you don't sell at private sale, it will be sold by the sheriff at court, and then I doubt if it brings \$1,000. Now my advice to you as your attorney is, that you sell, and sell at \$1,800 cash, if you can get it. Now if you want to do this, send me a power of attorney to sell at \$1,800. Have it drawn up by an attorney there and properly witnessed and acknowledged, and signed by you and wife, and also have Mrs. Tibbets send me a power of attorney to release mortgage. If you do this, do it right off, if not, let it drop, and the land will be sold at forced sale, and then Mrs. Tibbets will not, hers being a second mortgage as I understand, get hardly anything out of it. It costs money to sell land under a foreclosure of mortgage and you ought to know it. I have written you plainly because I think you are foolish for not taking the \$1,800 cash and getting what you can. Of course, if you don't sell now, and the land is sold by the sheriff, I will do all I can to get a big price, but I doubt if you get more than \$1,000, if you get this, at sheriff's sale, and then the costs will have to be paid besides. If you sell answer by mail.

W. H. SNELL.

With no authority except such as may be inferred from this correspondence, Snell as the agent of Sowle, and in his name, on the 14th day of February, nearly a month after the offer to sell for \$1,500 had been made, entered into the written contract, under which the plaintiff claims, for the sale of the land for \$1,500, the price at which it had been rejected. It is very clear that he had no right

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to do this. The offer made by Sowle was not a continuing one. It was made with the intention clearly expressed, that if accepted at all, it must be done "immediately." It was not accepted, but, as we have seen, rejected. Thereupon, unless renewed, it was at an end, and a subsequent acceptance of no avail. An assent to a proposition to sell, as is well expressed in Benjamin on Sales, sec. 39 (c), "must, of course, be such as to conclude an agreement or contract between the parties. And to effect this, it must in every respect meet and correspond with the offer, neither falling short of, nor going beyond, the terms proposed, but exactly meeting them at all points and closing with them just as they stand." And further in the same section: "If a condition be affixed by the party to whom the offer is made, or any modification or change in the offer requested, this constitutes in law a rejection of the offer, and a new proposal, equally ineffectual to complete the contract until assented to by the first proposers. Thus, if the offer by the intended vendor be answered by a proposal to give a less sum, this amounts to a rejection of the offer, which is at an end, and the party to whom it was made cannot afterwards bind the intended vendor by a simple acceptance of the first offer." The case at bar is fairly within this rule. Snell was the medium of communication between Matthews and Sowle. Upon his suggestion he was, by Sowle's letter of January 19th, given the agency to make a sale at once and for a fixed price. This agency being special, could only be executed so as to bind the principal, by keeping strictly within the prescribed bounds. An agent employed for a special purpose derives from this no general authority from his principal. 1 Parsons on Contracts, 43. If such an agent exceed his authority the principal is not bound. Id., 40. It is the duty of persons dealing with a special agent to ascertain the extent of his authority; and the principal will not be

Robinson v. O'Conner.

bound by any act of the agent not warranted expressly by or by fair and necessary implication from the terms of the authority delegated to him. Chitty on Contracts, 216. Sowle had neither said nor done anything from which Matthews could have supposed that Snell's authority exceeded that given by the letter referred to. By the terms of that letter, as we have shown, the authority was required to be exercised at once, which was not done, nor until nearly a month afterwards, at which time the agency had been positively renounced by Snell's letter of January 27th, and his authority terminated. There was a proposal by Sowle to sell for a given price, which was rejected. Accompanying the rejection was an offer of a less price, which was refused, and this was followed by an acceptance of the first proposal.

Upon the facts of this case it is impossible to say that, at the time of entering into the contract for the sale of this land, Snell had any authority whatever to make it. It was a void act. For these reasons the judgment must be reversed and the action dismissed at the costs of the plaintiff.

REVERSED AND DISMISSED.

NANCY M. ROBINSON, PLAINTIFF IN ERROR, v. PATRICK W. O'CONNER, AND OTHERS, DEFENDANTS IN ERROR.

Referee: PRACTICE. The right of a referee to proceed with a trial of issues referred to him by order of court, does not extend beyond the time at which he is directed to make his report.

ERROR to the district court for Lancaster county. The facts appear in the opinion.

12	405
13	46

Brown, Ryan & Brown, and Harwood & Ames, for plaintiff in error.

Lamb, Billingsley & Lambertson, for defendants in error.

LAKE, CH. J.

According to the view we take of this case, the judgment must be reversed on the sole ground of a want of jurisdiction in the referee.

It appears that the referee was appointed at the October term, 1879, of the district court, and that on the 14th day of said term, to-wit: on the 10th of November, 1879, the time within which he was required to make and file his report, was "by the court extended to the first day of the next term," viz: the February term, 1880. But nothing whatever was done by the referee in the discharge of his duties under this authority until the time limited had fully expired, and this only in direct opposition to the earnest protest of the plaintiff in error, who filed an objection to his proceeding with the trial for want of jurisdiction to do so. The plaintiffs (defendants in error) however, insisting upon a trial, this objection was disregarded, and on the 19th of March, 1880, the report was completed and filed. Thereupon exceptions to the report were taken by which, among other questions raised, that of the referee's jurisdiction was renewed, and subsequently overruled by the court.

In this we think there was error. The referee was the court's officer; his right to proceed with the trial of the issues submitted to him depended entirely upon the order of the court, which he was not at liberty either to disregard or to transcend in any particular. When the time at which he was required to make his report had arrived his authority was at an end, and all that he afterwards did was void. Therefore the report should have been set aside.

The referee having acted without jurisdiction, his rulings upon the other questions raised before him will not be noticed. The judgment must be reversed, the report of the referee set aside, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE STATE, EX REL. GRAN ENSIGN, v. JOHN WALLICH, S.
AUDITOR OF PUBLIC ACCOUNTS.

12	407
16	680
12	407
50	97
54	656

1. Warrants on State Treasury: APPROPRIATION: CONSTITUTIONAL LAW. Warrants on the state treasury can only be drawn in pursuance of specific appropriations made by law. Cons., Sec. 22, Art. III.
2. Legislative Appropriation. An appropriation for objects described thus: "Fugitives from justice, rewards for escaped convicts, sheriffs' fees for conveying convicts to penitentiary, etc., \$18,000," cannot be drawn against in payment of sheriff's fees for conveying juvenile offenders to the state reform school.

ORIGINAL application for mandamus.

O. P. Mason, for relator.

LAKE, CH. J.

The relator is sheriff of Lancaster county. In the discharge of his duties as such he was required to convey one Nathaniel Brewster, a convicted juvenile offender, to the state reform school at Kearney, for which service he is justly entitled to receive from the state the sum of \$41.45, as the amount of his proper fees and expenses. He has made an account thereof in due form and presented it to the respondent, who has audited and allowed it, but refuses to draw his warrant upon the treasurer therefor, upon the sole ground of there being, as he claims, no appropriation from which it can lawfully be

paid. And the sole question to be answered is whether there be such an appropriation or not.

The constitution, in sec. 22, Article III, declares that: "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the auditor thereon." On behalf of the relator it is urged that this constitutional requirement is fully answered, as to this claim, in the following item of the general appropriation act, approved March 1st, 1881, in these words: "That the following sums of money, or so much thereof as may be necessary, is hereby appropriated for the payment of the current expenses of the government, for the years ending March 31st, 1882, and March 31st, 1883," etc. Then follow the several objects and amounts, among which we find: "Fugitives from justice, rewards for escaped convicts, sheriffs' fees for conveying convicts to penitentiary, etc., \$18,000." If the relator's demand fall within the purview of this clause, then the auditor is authorized to draw his warrant for the amount, there being still an unexpended balance sufficient to meet it, otherwise he is not.

It is not really insisted by counsel for the relator that the service performed by him related either to "fugitives from justice," to "escaped convicts," or to the "conveying of convicts to the penitentiary." It is very clear that it belongs to neither of these. But, it is said, that, in character, it is like unto the latter, and therefore, is fairly covered by the abbreviation "etc." which follows it, and by which the legislature must have intended any and all other objects similar to those specially mentioned.

That such may have been, and probably was, the design of the legislature, we admit, but that "etc." designates any object, or number of objects, in particular, we deny. It is equivalent to saying "and others," or "and so forth," which cannot properly be said to be a "specific" designa-

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tion of anything. In construing this provision of the constitution the rule that the words are to be given their usual, ordinary meaning, must not be disregarded. By this rule the term "specific appropriation" means a particular, a definite, a limited, a precise appropriation, which as to the services in question we do not think this appropriation is. To hold it to be so, would, we think, open a very wide and dangerous door to the treasury, and practically nullify one of the most valuable provisions of the constitution.

In the connection in which it is here found, we do not think that this abbreviation can be given any effect whatever. For these reasons the writ must be denied.

WRIT DENIED.

HIRAM W. W. BELL, PLAINTIFF IN ERROR, v. JOHN SHERER,
DEFENDANT IN ERROR.

1. **Pleading: PETITION.** A defendant has the right to insist that all of the facts essential to the existence of a cause of action against him and in favor of the plaintiff be stated in the petition. Such is the rule of the code.
2. ———: ———: **CONCLUSIONS.** And this rule is not duly observed by simply stating conclusions, or ultimate facts, which should be left to inference from primary facts properly alleged.
3. ———: ———: **WAIVER.** But such non-observance of the rule may be waived, and is waived, by answering to the merits, and going to trial without objection.
4. **Error: WEIGHT OF EVIDENCE.** In a proceeding in error the finding of a trial court, upon conflicting evidence, will not be disturbed, when it is not manifest that injustice has been done. Evidence examined and rule applied.

ERROR to the district court for Saline county. Tried below before WEAVER, J.

M. B. C. True, for plaintiff in error.

Hastings & McGintie, for defendant in error.

LAKE, CH. J.

This is a proceeding in error. The points relied on for obtaining a reversal of the judgment are two. *First.* That the finding and judgment are contrary to the evidence and law of the case. *Second.* That the petition states no cause of action.

The action was brought by the defendant in error to recover the possession of specific personal property, consisting of one reaper and mower, twenty-four acres of corn, and a stack of wheat, all of the value of one hundred dollars, which had been seized under an execution to satisfy a judgment against him. The ground upon which the right to recover was placed was the exempt character of the property, as shown by the averment "that each and all of the above described goods and chattels consists of articles which are, and were at the time of said levy, specified in the statute as absolutely exempt from levy or sale on execution; and this plaintiff was at the time of levying of said execution by said defendant on said goods and chattels, and now is, a resident of the state of Nebraska, and the head of a family, and actually engaged in the business of agriculture, and then claimed, and now claims, said property as exempt."

To this averment it is now for the first time objected that it deals with conclusions merely, giving no facts on which those conclusions must of necessity depend. For instance, it is alleged that the property in controversy "was exempt from execution," yet there are no facts from which it could be inferred that it really was so exempt. Had this objection been properly presented in the court below, probably it would have been sustained. But, being made for the first time here, although the averment that the property was exempt is but a conclusion, it having been so satisfactory that issue was taken

upon it, by answering to the merits, it is now too late to urge it. A defendant has the right unquestionably to insist that all of the facts essential to the existence of a cause of action against him, and in favor of the plaintiff, be stated in the petition. The rule of the code upon this point requires: "A statement of the facts constituting the cause of action in ordinary and concise language, and without repetition." Sec. 92. And this rule is not duly observed by simply stating conclusions, or ultimate facts, which should be left to inference from primary facts properly alleged. But such non-observance of the rule may be waived, and is waived, by answering to the merits, and going to trial without objection.

As to the question of the sufficiency of the evidence to sustain the finding, there is no just cause of complaint. The only witnesses called were the parties themselves. According to the testimony of the defendant in error it may reasonably be inferred that he was entitled to hold the whole of the property levied upon as exempt. He swore that he was a resident of this state, the head of a family and engaged in agriculture; that the whole of his personal property, besides household furniture, consisted of an old reaper worth about ten dollars, two horses and harness, a cultivator, plow, harrow, wagon, one cow, two hogs, and some two dozen pigs about three months old, twenty bushels of wheat, ten or twelve bushels of potatoes, and oats and corn sufficient only for food for his stock for about three months. His testimony is somewhat indefinite, but this is its fair import, and we think it brings his case fairly within the letter and spirit of the statute.

Opposed to this there is the testimony of the plaintiff in error, which, however, is confined solely to the quantity of grain owned by Sherer at the time of the levy. He makes no mention of any other property. His statements likewise are quite indefinite and unsatisfactory.

Bell v. Sherer.

He says: "I examined that corn. * * * Sherer told me there was from twenty to twenty-four acres in the piece on which I levied. The character of the corn was, I considered, better than the average that year. * * * I should judge there would be an average yield of from thirty to thirty-three bushels per acre. * * * I left Sherer a strip of corn running east from his house, I should think from four to six acres, the average was as good as the average in the field. * * * He had a stack of oats, two stacks of oats, and a stack of wheat, and I believe one or two ricks of wheat. It was in ricks; it was stacked loosely. The oats I think were very fair, they were stacked well, and lay well. There was one side of one of the stacks had the appearance of being sprouted. They were not large stacks; they were small stacks. I think they would average sixty to eighty bushels to the stack."

In addition to what we have just quoted, which is the substance of the testimony of this witness, there was introduced a written list of property served by Sherer upon Bell, at the time of the levy, with a view of having his exemptions determined under sections 521, 522, and 523 of the code. It is true that the quantity of grain mentioned in this list is somewhat larger than that testified to by Sherer upon the witness stand, but then it was based upon a mere estimate made before the wheat and oats were thrashed, or the corn harvested, while his testimony was given afterwards, and when he had the means of knowing pretty nearly the actual quantity. In other respects the list does not differ materially from his oral testimony.

Such being the testimony and showing on which the court below had to pass, we do not think there is any reasonable ground for saying that injustice has been done. At any rate it is not manifest that such is the case, and therefore the judgment must be affirmed.

JUDGMENT AFFIRMED.

MARTIN A. RICH ET AL., PLAINTIFFS IN ERROR, V. HIRAM SAVAGE ET AL., DEFENDANTS IN ERROR.

1. **Replevin: RETURN OF PROPERTY.** One B., as surety upon an undertaking in replevin, after judgment against him for a return of the property or its value, took the property in controversy under a chattel mortgage from R. to whom it had been sold, and delivered it to the party entitled to it under the judgment in satisfaction thereof. *Held*, That he thereby surrendered his claim under the mortgage.
2. ———: **QUESTION FOR JURY.** R. and G. purchased a well auger and appliances from M., while an action for the possession of the same was pending between M. & S. Judgment was rendered in favor of S., when B., one of the sureties on the undertaking in replevin, obtained possession of the property under a mortgage and delivered it to S. *Held*, That the question whether such delivery was with the assent of R. and G. was properly submitted to the jury.

ERROR to the district court for Gage county. Tried below before **WEAVER, J.**,

Colby & Hazlett, for plaintiffs in error.

Bush & Rickards, for defendants in error.

MAXWELL, J.

This is an action of replevin brought by the plaintiffs against the defendants, to recover the possession of a well auger and appliances.

The defendants in answer to the petition allege in substance, that on the 5th of May, 1879, Hiram Savage, one of the defendants herein, recovered a judgment in the district court of Gage county, against Samuel Mayberry, for the possession of the property in question, and that the issues presented in said action were the same as are presented in this case, and that the plaintiffs purchased the interest of said Mayberry in said property, while said action was pending, and are bound by the

Rich v. Savage.

judgment in favor of the defendant. To this answer the plaintiffs filed a reply in which they admit the recovery of the judgment; admit that they purchased the interest of Mayberry in the property in controversy while the action between Savage and Mayberry was pending, and state in substance, that after the judgment in favor of Savage, one James Boyd, one of the sureties on the undertaking in replevin for Mayberry, obtained possession of the property in dispute under a chattel mortgage, given by Mayberry to him, to secure the sum of \$75.00, and delivered said property to Savage in satisfaction of said judgment in replevin. That afterwards, and prior to bringing this action, said Boyd released for a time his right to the possession of the property in question, under said chattel mortgage, and authorized the plaintiffs to take possession of said property, etc. On the trial of the cause in the court below the jury found in favor of the defendants, and that the value of the property was the sum of \$200.00. A motion for a new trial having been overruled judgment was entered on the verdict.

There is testimony tending to show that the plaintiffs gave their consent to Boyd's taking the property in dispute under his mortgage, and delivering it to Savage, in satisfaction of the judgment. This being the case, the court instructed the jury as follows:

"The plaintiffs in their reply in this cause state that James Boyd, prior to the time of the delivery of the property in controversy to the defendant Savage, had a chattel mortgage on said property for seventy-five dollars, and that Boyd having the property in possession by virtue of said mortgage, delivered the same to the defendant, in satisfaction of a certain judgment and heretofore rendered; and the reply of plaintiffs further says that James Boyd is one of the parties against whom the judgment existed. This delivery of Boyd conveyed all of his interest to the defendants, and the court instructs you that

from these facts set up in plaintiffs' reply the defendants have a right to recover, and the value of their possession was at least equal to the amount of Boyd's interest as shown by the reply, viz: \$75.00, and interest on the same at seven per cent since the commencement of this suit."

"And now, if you shall find from the evidence that the plaintiffs in this suit consented, for the said Boyd, to deliver the said property in controversy to the defendants, in satisfaction of the judgment mentioned in the reply, then you will find that the defendants were the owners of the property at the commencement of this suit, and find, what the value of the property was at that time, and assess the defendants' damages at such amount as may be just and proper for the unlawful taking of said property by the plaintiffs."

The first of these instructions is based upon the fact that a judgment for a return of the property in controversy, or its value, had been rendered against Mayberry, and that Boyd was one of the sureties upon the undertaking, and liable to pay the judgment. Boyd therefore, instead of paying the value of the property, took possession of it under an alleged chattel mortgage, and delivered it to the party entitled to it under the judgment, and so discharged his liability. This delivery seems to have been made without any conditions, and Boyd thereby seems to have surrendered his claim. If this was not so he could have delivered the property to Savage, and thereby have obtained satisfaction of the judgment, and immediately thereafter have claimed the property under the mortgage. This he could not do, and there is no error in the instruction.

The second instruction is predicated upon the testimony tending to show the consent of Rich to the delivery of the property to Savage in satisfaction of the judgment. It is claimed that the testimony does not warrant the instruction, but we think it does. In fact, in

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reading the testimony upon that point, we are led to believe that there was a scheme to use this property to satisfy the judgment in favor of Savage, and immediately after such satisfaction claim the property as belonging to the plaintiff.

Honesty and fair dealing do not require so many shifts and devices, and, in our opinion, the instruction was proper. The value of the property was fixed by the plaintiff, Rich, at \$200.00, and his is the only testimony upon that point. The defendants are entitled to a return of the property—not a portion of it—or its value in money. They are therefore entitled to the amount of the judgment. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

GEORGE FISHER, APPELLEE, v. MARY J. FISHER, APPELLANT.

Deed: EXECUTION BY ONE NON COMPOS MENTIS. One F., who was subject to aberration of mind, to such a degree as at times to be *non compos mentis*, and while in that condition executed a deed for all his real estate to one H., who thereupon conveyed to the wife of F., no consideration being paid. *Held*, That F. was entitled to a cancellation of the deed and a reconveyance.

APPEAL from the district court of Jefferson county. Tried below before WEAVER, J.

Slocumb & Hambel, for appellant, cited *Mulloy v. Ingalls*, 4 Neb., 117. *Jackson v. King*, 4 Cowen, 207. *S. C.* 15 American Dec., 357. *Burgess v. Pollock*, 53 Iowa, 273. *S. C.*, 36 Amer. Rep., 219. *Stewart's Executors v. Lisenard*, 26 Wend., 255. *Blanchard v. Nestle*, 3 Denio, 37. *Franklin v. Kelly*, 2 Neb., 117. *Staples v. Wellington*, 58 Maine, 453. *Chandler v. Barrett*, 21 La. An., 58. *Lewis*

v. Baird, 3 McLean, 56. *Hix v. Whittemore*, 4 Metcalf, 545.

S. N. Lindley and J. S. Tate, for appellee.

MAXWELL, J.

This is an action to cancel a deed conveying certain real estate belonging to the plaintiff. The plaintiff alleges in his petition that he is in possession of certain real estate, a description of which is set out in the petition; that he is aged and of infirm health, and is subject to temporary aberrations of mind, to such a degree, as to be at times entirely *non compos mentis*; that in December, 1879, while suffering from an attack of this kind, and while not conscious of what he was doing, he was induced by the defendant, who is his wife, to execute to one Jacob Hedden a deed conveying all of his real estate, a description of which is set out; that thereupon said Hedden conveyed said land to the defendant; that both of said conveyances were entirely without consideration, and were made for the purpose of defrauding the plaintiff; that as soon as the plaintiff recovered from said aberration of mind and heard of said conveyance, he demanded a reconveyance of said land from said defendant; that said defendant then refused and still refuses so to reconvey; that the defendant has removed from said land and has sold, or threatened to sell, all the grain raised thereon during the year 1880, together with other personal property on said land; that the plaintiff's health is still so feeble that he is unable to protect his property; that he has no other property to pay his debts or as a means of support. The plaintiff therefore prays that said deeds be declared fraudulent and void, and that the defendant be required to reconvey to the plaintiff, etc.

The defendant in her answer admits that she is the wife of the plaintiff, admits that a deed of conveyance of

Fisher v. Fisher.

the land described in the petition was made by the plaintiff to Hedden, and by Hedden to her, but she denies that said deeds were made without consideration, but alleges that the plaintiff was indebted to her in the sum of \$800.00 for moneys loaned out of her separate estate, and that the plaintiff by said conveyance intended to prefer her claim over that of other creditors; that the plaintiff, by gross and abusive treatment and repeated threats of personal violence, has compelled the defendant to abandon said premises, and to rely upon her own personal exertions with the assistance of friends for her support; that said real estate was acquired and improved almost entirely by the labor of the defendant and her children, and by moneys derived from her separate estate, etc.

The reply is a general denial.

On the trial of the cause the court found "all the allegations contained in the plaintiff's petition to be true and supported by the evidence," and rendered a decree in favor of the plaintiff and required the defendant to reconvey said premises within ten days, etc. The defendant appeals to this court.

The only objection urged against the decree is that it is not sustained by the evidence. The testimony clearly establishes the following facts. *First.* That the plaintiff was not in his right mind at the time he executed the deed to Hedden for the premises in question. *Second.* That no consideration whatever was paid for the land.

These facts certainly were sufficient to justify the court in decreeing a reconveyance. A review of the testimony, which is quite voluminous, would merely carry into the reports matters pertaining to the private affairs of a family, without subserving any good purpose.

The decree is clearly right, and is in all things affirmed.

DECREE AFFIRMED.

CHURCHILL PARKER, PLAINTIFF IN ERROR, v. JOSEPH NANS-
SON, ET AL., DEFENDANTS IN ERROR.

1. Action for Use and Occupation: VERDICT FOR THE PLAINTIFF. Evidence examined, *held*, not to support the verdict, and a new trial awarded.
2. Landlord and Tenant. A tenant in possession of property under a lease cannot dispute his landlord's title, nor take from another a paramount title to the injury of his landlord, nor absolve himself from the payment of rent to his landlord, by taking a lease from a stranger.

ERROR to the district court for Douglas county. Tried below before SAVAGE, J.

Kennedy & Gilbert, and *John D. Howe*, for plaintiff in error.

Redick & Connell, for defendants in error.

LAKE, CH. J.

The verdict in this case cannot possibly be upheld. The evidence is overwhelmingly against it. Even that introduced by the defendants in error alone does not support it.

The action was brought to recover for the wrongful use and occupation of certain premises, belonging to the defendants in error, which they allege the plaintiff in error did "on the 8th day of September, 1877, and while said premises were in the peaceable possession of" the defendants in error, "wrongfully and unlawfully obtain and take possession," and did keep them out of possession, "from said last mentioned date until about the 8th day of February, 1879," by reason of which they have "sustained damages in the sum of twelve hundred and seventy-five dollars."

There is not a particle of evidence to show this charge

to be true. It is not proved that Parker was in the occupancy of the premises during any portion of the time mentioned, but on the contrary it is conclusively shown that he was not. The uncontroverted evidence is that on the 6th of September, 1877, the defendants in error, being then the equitable owners, through their agents and attorneys John I. Redick and W. J. Connell, executed a lease of said premises, running six months, to Susan T. King, the wife of R. G. King, who for several years previous to this time was the owner, and in the actual occupancy thereof. The lease was executed by "Susan T. King, by R. G. King, agt." The rent reserved was \$225.00, payable Sept. 20th, 1877, and three other payments of \$75.00 each, on the 6th days of Dec., Jan., and Feb. following. Under this lease King and his wife, who were already in possession, continued to occupy said premises during the whole of said term, which expired March 5th, 1878, and afterwards, until the 18th of that month, when they were taken possession of by O. P. Hurford, as receiver, duly appointed by the United States circuit court for the district of Nebraska, in the suit of *The First National Bank of Omaha v. Susan T. King, and others*, in which suit the defendants in error were parties. Hurford remained in possession until long after the time for which damages were claimed against Parker.

The only connection that the plaintiff in error had with the premises in question, briefly stated, is this. Having an equitable interest in them, subject, however, as it appears, to that of the defendants in error, and learning that the legal title to an eighty acre tract, of which the premises in question were a part, was held by the Omaha and Northwestern Railroad Company, he procured a conveyance in fee to himself, without their knowledge, and on the 14th of January, 1878, gave a lease thereof to said R. G. King, for the term of two years, at a stipulated rent. This lease contained a provision to the effect that

if King paid the rent agreed upon, together with certain other obligations which Parker held against him, taxes, etc., he would convey the land to Susan T. King, according to the conditions of a contract also entered into with her sometime previous. It is not shown that King or his wife paid any rent, or performed any of the stipulations of said lease or contract on their part. Their occupancy, which commenced under the lease taken from Redick & Connell as before stated, was not interrupted until by the entry of the receiver Hurford, under the order of the court. Under this state of facts, it seems very clear to us that no cause of action is shown against Parker, and that the recovery was unwarranted. King and his wife were the tenants of the defendants in error. Between them the relation of landlord and tenant was established by the lease from Redick & Connell, and this relationship was not in the least affected by the taking of a subsequent lease or contract from Parker. They, and not Parker, were liable for such occupancy.

In 1 Greenleaf on Evidence, sec. 25, it is said: "It was an early rule of feudal policy that the tenant should not be permitted to deny the title of the lord, from whom he had received investiture, and whose liegeman he had become; but as long as that relation existed, the title of the lord was conclusively presumed against the tenant to be perfect and valid. And though the feudal reasons of the rule have long since ceased yet other reasons of public policy have arisen in their place, thereby preserving the rule in its original vigor."

And in 1 Phillips on Evidence, Cowen & Hills, and Edwards' Notes, 467: "Where a tenancy is created by a lease by deed indented, the tenant may be estopped from saying anything repugnant to it, according to the strict law of estoppels as applicable to deeds. Where the lease is not by deed, the tenant, or any person claiming under him, is precluded from objecting to the title of the land-

Parker v. Nanson.

lord from whom he has received possession, or to the title of any party claiming under his landlord." And the rule is the same where the tenant takes the lease, while he is in possession. *McConnell v. Bowdry's Heirs*, 4 Monroe, 392. So, too, if the tenant hold over after the expiration of his term. *Mattis v. Robinson*, 1 Neb., 1.

Such being the facts and the law applicable thereto, we are of the opinion that the court erred in refusing to give to the jury several instructions requested by counsel for the plaintiff in error, among which were the following:

"11. There is no dispute that King at the time he took the lease of the mill property from Redick & Connell, Sept. 6th, 1877, became the tenant of Redick & Connell, and was holden to them for the rents of the mill under said lease for the full term specified in the lease."

"12. King, while in possession of said property, under said lease, as the tenant of Redick & Connell, could not take a paramount title from Parker, or any one else, to the injury or detriment of his landlords. In other words, King could not dispute the title of his landlords, Redick & Connell, to the property, nor absolve himself from the payment of rent to them during the existence of that relation by acknowledging Parker as his landlord, or by taking a lease from him."

"13. The conveyance by Redick & Connell to the plaintiffs during the life of the lease carried with it all the rights that Redick & Connell had, and so long as King occupied the mill property under that lease, after that date, as between him and the plaintiffs, he was their tenant, and was liable to them for such use and occupation of the mill property for that time."

There are several other matters of alleged error relied on, but the ones we have here noticed being radical and decisive of the case, we will not take time to refer to them.

Strine v. Kaufman.

The judgment must be reversed, and a new trial awarded.

REVERSED AND REMANDED.

WILLIAM R. STRINE, PLAINTIFF IN ERROR, v. MOSES KAUFMAN, DEFENDANT IN ERROR.

Practice in Justices' Courts: VACATION OF JUDGMENT. Where a defendant has entered his appearance to the action, and absents himself on the day of trial, he is not entitled to have the judgment against him set aside, under sec. 1001 of the code.

ERROR to the district court for Otoe county. Tried below before POUND, J.

C. W. Seymour and T. B. Stevenson, for plaintiff in error.

Watson & Wodehouse, for defendant in error.

LAKE, CH. J.

In *Strine v. Kingsbaker*, ante page 52, we held that where a judgment is rendered against a defendant on a default by a justice of the peace, he may, as a matter of right, have it set aside, as provided in sec. 1001 of the code, Comp. Stats., 645. And in *Clendenning v. Crawford*, 7 Neb., 474, the same principle was recognized in the ruling, that, where a defendant fails to appear as commanded by the summons, and judgment goes against him, he cannot appeal, his remedy being the one given by this section of the statute.

But the precise question here presented was not involved in those two cases. The question now to be decided is, whether, after an appearance by the defendant, issue joined, and a continuance of the case, he may, upon absents himself on the day of trial, still have the benefit

12	423
14	286
14	260
14	360
23	496
19	433
25	282

19	423
29	190

12	423
36	208
36	411

12	423
40	717

of that provision of the law? On the one hand, it is strongly insisted that he may, while on the other it is contended that he may not, and that the right belongs only to defendants who have failed to appear to the action.

It must be admitted that the question is not free from embarrassment. Our duty is, of course, to ascertain and declare the will of the law makers in framing the provision. It is declared, that "when judgment shall have been rendered against a defendant, *in his absence*, the same may be set aside," upon certain conditions. The required "conditions" were complied with, and the question must be determined by the meaning to be given to the words "in his absence," as used in the quotation. Are they to be taken literally, and as embracing every case of personal absence of a defendant from the presence of a justice when judgment is rendered against him? If so, then the collection of demands in justices' courts can be postponed indefinitely at the option of the debtor. If after an appearance, and issue joined, a defendant has the power, by absenting himself on the day of trial, to have the judgment set aside once, what is there to prevent him from doing so again, or indeed any number of times that he may choose? There is certainly nothing, if the construction contended for by counsel for the plaintiff in error is the true one.

Indeed, if so literal a construction were given, a defendant would be enabled, even after trial had, if the justice chose to postpone his decision—as he may do for four days, in certain cases—to render the judgment abortive by a resort to this provision of the law. We cannot think that results, so pernicious as these would be, could have been intended by the legislature, and we are therefore inclined to hold, as claimed by counsel for the defendant in error, that the word "absence" as here used is equivalent to non-appearance to the action. In this we are sup-

The State v. Sanford.

ported by Worcester, who, in his unabridged dictionary, adopting the definition of Burrill, says: "absence" in law means "non-appearance." The plaintiff in error therefore was not absent in the legal sense of the word. In obedience to the command of the summons he had appeared; he was not in default; he was in court, although not personally present, and therefore not within the contemplation of the section under which he seeks relief. The judgment must be affirmed.

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, EX REL. EBEN H. TUCKER, v.
ESEK SANFORD.

Release of exempt property from attachment. Exempt property held by a constable under an order of attachment, issued by a justice of the peace, cannot be released under sections 522 and 523 of the code, but may be by order of the justice.

ORIGINAL application for mandamus.

Bush & Rickards, and *Hale & Bibb*, for the relator.

A. Hardy, for the respondent.

LAKE, CH. J.

This is an original application for a peremptory writ of mandamus to compel the defendant as constable to call appraisers, and have the relator's exemption of personal property in lieu of a homestead ascertained, under sections 521, 522, 523 of the code. This is desired with a view of thereby releasing certain of the property from an order of attachment under which the officer seized and still holds it. From the view we take of the case but a single question need be considered, and that is simply whether these sections apply where property is so held. They are as follows:

12	425
13	522
18	425
26	242
12	425
27	502
12	425
31	464
12	425
556	424

Sec. 521. All heads of families who have neither lands, town lots, or houses subject to exemption as a homestead under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property.

Sec. 522. Any person-desiring to avail himself of the exemption, as provided in the preceding section, must file an inventory, under oath, in the court where the judgment is obtained, or with the officer holding the execution, of the whole of the personal property owned by him or them, at any time before the sale of the property; and it shall be the duty of the officer to whom the execution is directed, to call to his assistance three disinterested freeholders of the county where the property may be, who, after being duly sworn by said officer, shall appraise said property at its cash value.

Sec. 523. Upon such inventory and appraisal being completed, the defendant in execution, or his authorized agent, may select from such inventory an amount of such property, not exceeding, according to such appraisal, the amount or value herein exempted, but if neither such defendant, nor his agent, shall appear and make such selection, the officer shall make the same for him.

Now can it reasonably be said of this language that it is susceptible of a construction which will make the steps provided for in the last two sections applicable where property of a debtor is held under an order of attachment? That property which is exempt from forced sale on execution is not attachable, is unquestionably true; but how is its exempt character to be established? Could it have been the design of the legislature, where a debtor's property is attached, and the court, in the language of the statute, has thereby "acquired jurisdiction" over it, that upon a mere ex parte affidavit and valuation, his right to an exemption out of it and its extent may be definitely settled? We think not. The language of the statute

evinces no such intention, and besides, such a rule would be entirely unreasonable and hostile to all of the analogies of the law.

To us the idea very clearly expressed by this language is, that the proceeding sought by the relator was intended to be given only where property of a defendant is seized, after judgment, under an ordinary execution. The first step to be taken is the filing of an inventory by the debtor of all his personal property "in the court where the judgment is obtained, or with the officer holding the execution." But in the case of the relator this could not have been done, for the very good reason that no judgment had yet been rendered, nor execution issued. The action had just been commenced, the property of the debtor seized and brought within the control, not of a mere ministerial officer, but of a court possessing jurisdiction to judge all rights respecting it; and surely the law is not so unreasonable as to require that same property to be released through a mere *ex parte* proceeding before a constable.

When a constable under an order of attachment seizes property of the defendant, he is required to "hold it subject to the order of the justice." Sec. 929, code of civil procedure. If, because it is exempt from forced sale in payment of debts, its release be desired, it may be had through an order of the justice to that effect. We are of opinion that the writ should be denied.

WRIT DENIED.

MAXWELL, J., dissenting.

I concur in the opinion of the majority of the court, so far as it is held that the justice may discharge the property attached, but I cannot give my assent to that portion of the opinion which holds that that remedy and replevin are exclusive.

The articles levied upon in this case, are the following:

The State v. Sanford.

Boxes of household goods, consisting of beds, bedding, pictures and wearing apparel.

1 chest containing dishes and wearing apparel.

1 extension table.

1 bdl chairs.

1 heating stove.

1 bundle of stove pipe and loose joints.

1 bundle of elbqws.

1 wash stand.

1 cook stove.

1 R. chair and stand attached.

1 sewing machine.

1 table.

1 desk.

1 box or chest of carpenter tools.

The case is submitted to the court upon the following statement of facts:

It is hereby stipulated and agreed by the parties hereto:

1. That the plaintiff, Tucker, is the head of a family residing with the same.

2. That he has resided in Gage county, Nebraska, for three years, prior to January 1st, 1882.

3. That on January 1st, 1882, he went into the state of Missouri, engaged in business there as foreman of a gang of carpenters on a railroad, for which he was to be paid a monthly salary, and with intention of removing there, and on the 10th day of January, A. D. 1882, he caused the goods now held under an order of attachment, to be boxed up, loaded upon the cars, and attempted to ship them to his wife's brother at Kansas City, in the state of Missouri, where he intended to live and reside. That on said 10th day of January, 1882, one O. O. Wells, sued out a writ of attachment, grounded upon the allegation that the said Tucker was about to remove his property, or a part thereof, out of the county of Gage, in the state of Nebraska, with intent to defraud his creditors.

And the defendant, Esek Sanford, constable, served the same by attaching the goods. That said attachment suit was set for hearing, on motion of Tucker to dissolve the same, before Peter Shafer, a justice of the peace, in and for Gage county, and on the hearing of said motion by Tucker, filed before said justice, to dissolve said attachment, because of alleged irregularities in obtaining the same, and because of an allegation in said motion that said property was exempt, and that the affidavit for attachment was untrue, which said allegations were supported by affidavits, and an inventory under oath was also filed with said motion, covering all the property belonging to the said Tucker. Said motion was opposed by counter affidavits, and the said justice dissolved said attachment, to which Wells excepted. Thereupon said justice fixed the time for Wells to file petition in error at ten days, and thereupon Wells filed his undertaking for the purpose of reversing said order dissolving said attachment in the district court, as provided for by sec. 236 e, page 561, of Compiled Statutes, which undertaking was duly approved by said justice of the peace, and said justice ordered said Sanford to retain said property in custody and not part with the possession of the same. That on the 23rd day of January, 1882, Tucker filed with Sanford, the defendant herein, an inventory of said property under oath, which is hereto attached, marked "A," and Sanford refused and still refuses to act, as provided by sec. 522, page 599, of the Compiled Statutes of Nebraska; that said property and all the property owned by the said Tucker, does not exceed in value the sum of \$500.00, and that he, the said Tucker, has neither lands, town lots, or houses, subject to exemption as a homestead under the laws of this, or any other state; that said claim is for services as a physician and for medicine, and further, that the wife of the plaintiff, Tucker, was about to depart from this state when said goods were attached.

and has since departed and gone to the state of Missouri to live with her husband there.

Section 590 of the code provides that: "No property hereinafter mentioned shall be liable to attachment, execution, or sale, on any final process issued from any court in this state, against any person being a resident of this state and the head of a family. *First.* The family bible. *Second.* Family pictures, school books and library for the use of the family. *Third.* A seat or pew in any house or place of public worship. *Fourth.* A lot in any burial ground. *Fifth.* All necessary wearing apparel of the debtor and his family. All beds, bedsteads and bedding necessary for the use of such family. All stoves and appendages put up or kept for the use of the debtor and his family, not to exceed four. All cooking utensils, and all other household furniture not herein enumerated, to be selected by the debtor, not exceeding in value one hundred dollars. *Sixth.* One cow, three hogs, and all pigs under six months old, and if the debtor be at the time actually engaged in the business of agriculture, in addition to the above, one yoke of oxen, or a pair of horses in lieu thereof; ten sheep, and the wool therefrom either in the raw material or manufactured into yarn or cloth; the necessary food for the stock mentioned in this section, for the period of three months; one wagon, cart or dray, two plows and one drag; the necessary gearing for the team herein exempted; and other farming implements not exceeding fifty dollars in value. *Seventh.* The provisions for the debtor and his family necessary for six months support, either provided or growing, or both, and fuel necessary for six months. *Eighth.* The tools and instruments of any mechanic, minor or other person, used and kept for the purpose of carrying on his trade, or business. The library and implements of any professional man. All of which articles hereinbefore intended to be exempt shall be chosen by the debtor, his

agent, clerk or legal representative, as the case may be."

The section above quoted was passed by the legislature at the 1859-60 session, and, so far as I am aware, no attempt has been made to change it since that time. At the time of the passage of the act, no mode of procedure was provided therein; but in 1866, provision was made for filing an inventory, under oath, setting forth the whole of the property owned by the debtor, in cases where the \$500.00 exemption in lieu of a homestead was claimed. This mode of procedure being that given by statute, and being simple and inexpensive, has, I believe, generally prevailed in this state, not only in cases where the \$500.00 exemption in lieu of a homestead was claimed, but in all other cases where property was claimed as exempt, whether levied upon by execution or attachment. And, in the case of *The State v. Cunningham*, 6 Neb., 90, this procedure was approved by this court, and the sheriff compelled by mandamus to call appraisers to appraise property claimed as exempt, which was levied upon under an order of attachment.

Since that decision was made, section 182 of the code has been amended so as to permit an action of replevin to be brought to recover the possession of exempt property, levied upon under an execution or attachment. The remedy by replevin, however, is in many cases unavailing from the inability of the debtor to give the requisite security. But the remedy by replevin, or by a dissolution of the attachment, is not, in the opinion of the writer, the only one to which the debtor is entitled. The object of the law is to throw a shield around the poor; to protect them in the possession of the necessary wearing apparel, the necessary beds, bedding and furniture; the necessary food for a limited period for the family, and such stock as is exempt; the necessary tools or implements, to enable the debtor to prosecute his particular business or profession.

Now, suppose, that any or all of the articles specifically exempted, are levied upon under an attachment, the court from which the attachment is issued is absolutely unable to grant the needed relief. The court may dissolve the attachment, and order a return of the attached property, but the creditor may file an undertaking and take the case on error to the appellate court, and thus for six months or a year prevent the return of property that was not liable to attachment. In the case at bar, the justice ordered the discharge of the attachment, but the creditor filed an undertaking, and still holds the property.

A remedy to be adequate must afford speedy relief—that is, a speedy restoration of the exempt property. If this is denied, it is in the power of an unfeeling and unscrupulous creditor to cause an attachment to be levied upon every article of exempt property, including all the wearing apparel of the debtor and his family not actually on their persons, and cause such property to be retained, notwithstanding the orders of the several courts to which the case has been appealed, discharging the attached property, until the final order of this court declaring the property exempt. It is in the power of such creditor to invade the household with an attachment and strip it of every article of comfort, utility or convenience, of every particle of food, and leave nothing but the bare walls of the building, while the debtor without means, with his family reduced to beggary, must contest his rights through the several courts, before he can have a return of the property which the law declares shall not be liable for his debts. Such a remedy is but little better than none in such case. A prompt and efficient remedy is afforded by mandamus to compel a public officer to perform his duty, and if questions of fact arise they can be as readily determined in that case as in any other.

In the case at bar, the creditor seems to have made an

affidavit that the debtor was about to remove his goods from the state for the purpose of defrauding his creditors. The property is shown beyond question to be exempt. This court held in *Derby v. Weyrick*, 8 Neb., 174, that property which is exempt by law from liability for the owner's debts, is not susceptible of a fraudulent alienation. The owner may sell such property at his pleasure, and it is no fraud upon his creditors, because the exemption law was notice to them that the property was not subject to their demands. And the property being exempt while the owner was a resident of the state, does not lose its character while in transition from here to the state of Missouri. *Anthony v. Wade*, 1 Bush, 110. A mandamus should be granted and the property released.

J. B. DINSMORE & Co., PLAINTIFFS IN ERROR, v. BENJAMIN STIMBERT, DEFENDANT IN ERROR.

1. Negotiable Instruments: RIGHTS OF BONA FIDE PURCHASER.

On the case stated, *held*, that to enable a party to resist the payment of a negotiable note in the hands of a *bona fide* purchaser before maturity, for value, in the ordinary course of business, without notice, etc., on the ground that the said note was procured through the fraud and circumvention of the payees in some way or manner unknown to him, in and about the transaction and negotiation by the defendant had with the said payees, for the appointment of the defendant, as agent, to sell a certain patent fence post, etc., he must show that he is not chargeable with *any laches or negligence*, or misplaced confidence in others.

2. ———: ———: INSTRUCTIONS. Also *held*, that an instruction which, substantially, told the jury to find for the defendant, if they should find from the evidence "that the defendant before signing said note, used the diligence and care that a man of ordinary care and prudence would have used under similar circumstances, to ascertain its contents," was erroneous. That the jury should have been told, that to make such defense available, the defendant must show that he was *not guilty of any neglect in signing the paper*.

12	433
12	446
13	22
17	249
19	433
32	281
12	433
35	663
12	433
43	535
12	433
47	497
12	433
57	303
12	433
59	352
12	433
61	579
61	633

Dinsmore & Co. v. Stimbart

3. ———: PLEADING: PRACTICE. The answer of defendant "says, that he never signed said note," etc., "nor is his signature attached thereto genuine, but that, if he did sign said note, or if his signature thereto is genuine, then it was procured through the fraud, circumvention," etc. *Held*, that said answer was a substantial admission of the signing of the note, and that the submission to the jury for a special finding of the question—"did the defendant sign the note sued on?" was error.

THIS was an action on a promissory note for \$90.00, dated Sept. 29, 1879, and payable six months after date, to the order of Laird & Dezendorf. The note came into the hands of plaintiffs, who alleged that it was bought by them in good faith, for a valuable consideration, and without notice of any failure in consideration or defect. On trial before WEAVER, J., and a jury, in the district court for Clay county, verdict and judgment were for defendant, and plaintiffs brought the cause here for review on a petition in error.

Hastings & McGintie, and *Stone & Stone*, for plaintiffs in error, cited 1 Daniels on Neg. Inst., 699. *Ross v. Do-land*, 29 Ohio St., 473. *Selser v. Brock*, 3 Ohio St., 302. *Douglas v. Matting*, 29 Iowa, 498. *Nebeker v. Cutsinger*, 48 Ind., 436. *Shirts v. Overjohn*, 60 Mo., 305. *Frederick v. Clemens*, Id., 313. *Citizens Nat'l Bank v. Smith*, 55 N. H., 598. *Kimble v. Christie*, 55 Ind., 140. *Smith v. Columbus Bank*, 9 Neb., 31. Story on Promissory Notes, sec. 191. Story on Bills, 188. *Bassett v. Avery*, 15 Ohio St., 299. Edwards on Bills and Notes, 312.

John D. Hayes, for defendant in error, cited *Gibbs v. Linaburg*, 22 Mich., 479. *Walker v. Egbert*, 29 Wis., 194. *Taylor v. Atchinson*, 54 Ill., 196. *Cline v. Guthrie*, 42 Ind., 227. *Abbott v. Rose*, 62 Me., 194. *Griffiths v. Kellogg*, 39 Wis., 290. *Briggs v. Ewart*, 51 Mo., 245. *Brown v. Reid*, 79 Pa. St., 370. *Puffer v. Smith*, 57 Ill., 527. *Van Brunt v. Singley*, 85 Ill., 281. 1 Daniels Neg. Inst., sec. 849.

COBB, J.

The answer of the defendant in the court below is altogether indefinite and uncertain. He first alleges that he never signed the note, and that the signature thereto is not genuine. He then alleges, that if he did sign the note, or the signature thereto is genuine, then, that it was procured through the "fraud and circumvention of either Laird or Dezendorf or both of them, in some way or manner unknown to the defendant in the transaction and negotiation by the defendant had with the said Laird and Dezendorf in and about the appointment of the defendant, as agent, to sell a certain patent fence post, without any fault or negligence on the part of the defendant. That the only paper that he ever signed with the said parties, or either of them, was a contract represented by said Laird and Dezendorf to have been a contract, whereby said defendant was to be constituted the agent of said Laird and Dezendorf for the sale of a patent fence post, and that when he signed said paper he believed the representations to be true, and relied upon the representations of the said Laird and Dezendorf as being true, and was compelled to rely upon said representations, because there was no person in the immediate vicinity upon whom he could call to read the same," etc.

The answer in *Douglas v. Matting*, 29 Iowa, 498, cited by plaintiff in error, is substantially the same as this, and that was held by the supreme court of that state to substantially admit the execution of the note. And such must be true of the pleading under consideration. The defendant in the court below must be held to know his own signature. If the signature to the note was not his, then it was simply a case of forgery, and all of his pleading and testimony in regard to the representations of Laird & Dezendorf, his own inability to readily read English, etc., become immaterial.

We think the court below erred in submitting the ques-

tion: "Did the defendant sign the note sued on?" for a special finding, and thereby placing prominently before the jury a question, which, as we have seen, must be regarded as admitted by the answer. And we think it altogether possible that their general finding was controlled by this special one.

The court, below on the trial instructed the jury as follows:

1. If you shall find from the evidence, that the defendant signed the note sued on, and that Grimes & Dinsmore bought the note before due, for a valuable consideration, in the usual course of business, in good faith, and without any notice of any defense existing to said note, then you will find for the plaintiffs for the amount now due on the note, according to its terms.

2. Unless you shall find from the evidence that the defendant, without fault on his part, was procured to sign said note, and that said defendant was unable to read said note, and did not understand the contents thereof, but, under the false representations of the parties who took the note, fully believed the paper signed to be of a different character and not a note, and that there was no consideration for said note—I say, if you shall find from the evidence that the defendant signed the note, you may find for the defendant.

3. If you find that the defendant received no consideration therefor, and that the defendant signed the same upon a false and fraudulent representation of the parties who took the same, fully believing he was signing a paper of a different character—that is, if you further find that the defendant, before signing said note, used the diligence and care that a man of ordinary care and prudence would have used under similar circumstances, to ascertain its contents, and was without fault.

4. If the note was not signed by the defendant, your verdict will be for the defendant.

Except in one particular, but little fault can be found with the substance of these instructions, and that they treat it as an open and prominent question, whether the defendant did in fact sign the note. Yet we think that they are constructed in such a way that the jury might, and probably did, misunderstand their import and bearing. The true question was whether the defendant was tricked into signing the note by the artifice, device, and deception, or false reading, of the parties to whom he gave the note, or whether he was overcome by the glib tongue, winning manners, and over persuasion of these men, and thus thrown off his guard, and acted without the use of due diligence in ascertaining the true nature and character of the paper which he signed.

The leading case of *Putnam v. Sullivan*, 4 Mass., 45, arose upon facts as follows: The defendants were merchants of Boston, one of them being absent in Europe, and the other, having occasion to make a journey to Philadelphia, entrusted with an apprentice or clerk of the house a number of papers, on which one of the house had written the name of the firm in blank, some to be used as notes endorsed by the house, and others as notes in which the house were to be promisors. These papers were entrusted to a clerk of the defendants to be used when money was to be advanced on the sale of goods by the house on commission, or to renew the notes of the house when due at the banks. The clerk was directed to deliver one of the blanks to the promisor upon the note sued on in the action, to enable him to renew a note signed by him in the bank, of which the house were endorsers, and for which he had requested a blank to be left. The promisor called on the clerk for the blank endorsement left for him, and one was delivered to him; afterwards pretending that by some mistake it had become useless to him, and feigning to burn in the clerk's presence the name of the firm endorsed, procured another blank; and

by a similar pretension and contrivance he obtained a third and a fourth blank endorsement, the last of which was in fact used for the purpose for which the house had directed a blank endorsement to be given him. The promisor had used one of the prior blank endorsements for making the note sued on in the action; which had been negotiated with the endorsement remaining in blank with the plaintiff. C. J. Parsons, in the opinion of the court, says: "The counsel for defendants agree, that generally an endorsement obtained by fraud shall hold the endorsers according to the terms of it; but they make a distinction between the cases where the endorser through fraudulent pretenses has been induced to endorse the note he is called on to pay, and where he never intended to endorse a note of that description, but a different note and for a different purpose. Perhaps there may be cases in which this distinction ought to prevail, as if a blind man had a note falsely and fraudulently read to him, and he endorsed it supposing it to be the note read to him. But we are satisfied that an endorser cannot avail himself of this distinction but in cases where he is not chargeable with any laches, or negligence, or misplaced confidence."

Whatever may have been the course of decisions for a number of years after the date of the above case, we think it is quite generally followed now. To apply its doctrine to the case at bar, if the defendant signed the note in question through misplaced confidence in Laird & Dénendorf, then he was guilty of negligence and want of due diligence, and the loss must fall upon him.

In cases like this, where a note has passed into the hands of an innocent purchaser for value before maturity, we think that the defendant, before he can successfully defend on account of having been fraudulently induced to execute the note, must show a higher degree of diligence than that expressed in the instruction, in order to exclude the application of the rule, that where one of two

innocent persons must suffer a loss by reason of the fraud of a third party, the loss must fall upon the one whose act has furnished the means for the commission of the fraud. The reason of the rule we suppose to be, that while he, who has taken no part in the creation of the instrumentalities of fraud, could not have been guilty of negligence, or want of diligence, and thus contributed to the loss, the other could, and possibly was.

In the case of *Foster v. McKinnon*, Law Reports, 4 C. P., 704, decided in 1869, Byles J., delivering the opinion of the court, affirmed the charge of the chief justice at the assizes, in which he had directed the jury, that if the endorsement of the defendant of the bill of exchange sued on was obtained on a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant was not guilty of any negligence in so signing the paper, he was not liable as endorser to a *bona fide* holder. This case is approved and followed by the courts of New York in *Whitney v. Snyder*, 2 Lansing, 477, and *Chapman v. Rose*, 56 N. Y., 137. The latter was a case almost exactly like the one at bar, the difference being only that between a patent hay-fork and pulley and a patent fence post. In that case the opinion closes as follows: "To avoid such evils, it is necessary at least to hold firmly to the doctrine, that he who by his carelessness, or undue confidence, has enabled another to obtain the money of an innocent person, shall answer the loss."

We do not think it sufficient, in the language of the instruction, that the defendant should have "used the diligence and care that a man of ordinary care and prudence would have used under similar circumstances," in order to throw the loss on the *bona fide* purchaser for value before maturity, in the ordinary course of business, but that he should, in the language of Byles, J., above cited,

have been not guilty of any negligence in so signing the paper. The above views render it unnecessary to notice the other errors assigned. The judgment of the district court is reversed, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

12	440
36	682
12	440
39	814
12	440
51	101

COLE BROTHERS & HART, PLAINTIFFS IN ERROR, v. LORENZO B. WILLIAMS, DEFENDANT IN ERROR.

Contract: FRAUD. L. B. W., having contracted verbally with H., the agent of C. B. & H., to furnish and put up certain lightning rods at a cost not to exceed \$100, H. afterwards presented to him a paper for his signature, which he said was an order to the house to put up the work. L. B. W., not being able to read well without spectacles and having none at hand, requested H. to read the paper (several clerks of W. being in the same store with W. and H. at the time). H. read, or pretended to read, the paper, but did not read anything about the price to be paid for the rods, whereupon L. B. W. put his signature to it. It turned out that the paper contained a stipulation on the part of L. B. W. to pay for the rods at the rate of 37½ cents per foot, and that at that rate the rods furnished amounted to \$404.25. In a suit between the parties, *held* L. B. W. was not guilty of such negligence or want of diligence as would enable C. B. & H. to recover on the written instrument.

ERROR to the district court for Douglas county. Tried below before SAVAGE, J.

Keatley & Durham, (*W. J. Lamb* with them), for plaintiffs in error.

J. C. Cowin, for defendant in error.

COBB, J.

The defendant in error sued the plaintiffs in error in the court below for a bill of goods amounting to \$330.48, giving them credit "by lightning rods \$100.00," and

claiming a balance of \$290.48, with interest. The plaintiffs in error made answer admitting the sale and delivery of the goods, but setting up as a defense to said action the following special matter: "That some time on or about the 15th day of March, 1878, the plaintiffs herein, and this defendant, entered into a certain written contract or agreement, by the terms of which the defendants agreed to erect upon the building of the plaintiff, lightning rods, points, and ornaments stated in said agreement, and that the said defendant should make a discount from such prices, in the sum of one hundred dollars upon the whole work agreed to be done as aforesaid. Defendants further agreed therein, that in consideration of the furnishing and erecting the rods aforesaid, they would take goods out of plaintiff's store in the city of Omaha, to the amount of three hundred dollars to apply on the price agreed upon between the plaintiff and defendants for the furnishing and erecting said lightning rods, points, and ornaments aforesaid. If in the event of the said lightning rods, points, and ornaments so furnished and erected, as aforesaid, should not amount to the said sum of three hundred dollars at the price stated in said agreement, that defendants would pay plaintiff any balance so remaining due and unpaid upon settlement," etc. Said answer refers to the said contract as exhibit "A," and alleges the furnishing and erecting of the lightning rods, points, and ornaments therein specified for the plaintiff, and that the same amounted, at the price therein agreed upon, to the sum of \$404.25, etc. Said exhibit "A" is set out as follows:

Exhibit "A." Order for erection of rods. Mr. E. House, agent of Cole Brothers & Hart: Sir: Erect at your earliest convenience your Franklin lightning rods on my store building, points and ground rods, in accordance with the scientific rules as printed on the back of this order, and I agree to settle for the same upon the

Cole Brothers v. Williams.

completion of the work, by cash or note due, at 37½ cents per foot for the rod, including the length of braces, and \$8.50 each for platinum tipped points, vanes \$8.50, balls \$3.00, no extra charge for work. I want you to put on two four point compasses and all other ornaments you can to make the best of a job. We are to give Mr. Williams a discount off of his job of eighty-five dollars when settled for. Make your discount \$15.00 more, and we are to give Mr. Williams one dollar for each point he assists us in selling, and we are to give Mr. Williams three hundred dollars trade, and apply rods on trade, the balance to be cash on delivery of goods or on settlement. I want you to do the best job you ever done.

L. B. WILLIAMS.

The defendant in error, in and by his reply, denied that he was indebted to the said defendants in any sum whatever, admits that defendants have a just claim in the sum of one hundred dollars against him, which appears as a credit on the statement of plaintiff's account filed with his bill herein, and which said sum he alleges to be the consideration for the sale of certain lightning rods and fittings mentioned in the answer of defendants, and existing by virtue of a certain verbal contract between the plaintiff and defendant's agent, House, prior to the pretended written contract set up by the answer of the defendants. That as to the written contract pretended to be set forth in the said answer he denies that it is correctly set forth. "And plaintiff says that he never signed an agreement as set forth in said answer, and further says that he did sign a certain pretended written agreement between the parties concerning the said rods; but says that he was induced to sign the same through the false, wilful, and fraudulent representations and concealments of defendants' agent, House, made with intent to defraud plaintiff, and on which plaintiff relied, to-wit: After the said verbal contract had been made, in which

said agent agreed to put up good, abundant, and substantial Franklin rods on plaintiff's store at a cost of one hundred dollars, all ornaments, vanes, and compasses to be furnished plaintiff free and put on said buildings as a matter of advertisement for defendants' business, which said agent declared he wanted to advertise in this way, because plaintiff's building was new and prominent, and defendants had just come here to introduce their business, said agent then presented to plaintiff, in plaintiff's store, the said pretended contract, and asked plaintiff to sign the same. Plaintiff alleges that he is unable to see well, and after looking at the paper so offered could not well read it, and asked said agent what it was, and also asked him to read it for plaintiff, whereupon said agent said that the paper was simply a direction to the house as to the manner of putting up the rods, and proceeded to read the same, omitting in said reading all mention of prices. And plaintiff declares that he did not read it himself, but relying wholly on the statements and reading of said agent, and being deceived by the same, he signed the said paper; and that he would not have signed the same had said prices been read; and that he so signed upon the full faith and understanding that the consideration was as agreed upon by the said verbal contract," etc.

The verdict was for the plaintiff for the amount claimed.

The instructions excepted to by the defendants are as follows:

6. On the other hand, if you find from the testimony in the case that the plaintiff, being prevented by the temporary loss of his spectacles from reading said paper, applied to the agent of the defendants to read it for him, and thereupon said agent pretended to read the same, but did not read the same correctly, leaving out the prices therein contained, and concealed from the plaintiff the fact that a contract as to price was incorporated in said paper, and the contract as made was for said lightning rods

for \$100, then the plaintiff is entitled to recover the full amount of his bill, less only the said sum of \$100.

This instruction should be read in connection with the one which immediately preceded it, which is as follows:

5. If the plaintiff signed such paper knowing its contents or having the means at hand of making himself acquainted therewith, which he declined or neglected to use, then he is bound by its stipulations, and can only recover the amount of his bill for goods less the amount due under the written contract for lightning rods.

These two instructions taken together very fairly express the law applicable to the enquiry before the jury. The enquiry was, what contract did the plaintiff and defendants, through their agent, House, make in regard to the lightning rods? It is admitted that the plaintiff signed his name at the foot of the paper, which contained a statement of the price of the rods at $87\frac{1}{2}$ cents per foot, etc. If he did this knowingly, or carelessly and negligently, and free from any act of bad faith or deception on the part of the defendants or their agent, he would be bound by it.

In one point of view the signing of a written instrument without reading it, because of the temporary loss of one's spectacles, where the use of another pair could have been procured without much effort, or in such case relying upon an interested party on the other side to read it, when one's own friends or employees were near at hand, would be regarded as negligence, and the want of due diligence, in case it turned out that the paper signed was of a different character and import from that purporting to have been read and intended to be signed. But in this case the defendants are in no position to suggest the carelessness or want of diligence on the part of the plaintiff in relying on the good faith and truthful reading of their agent, even had his eye-sight been perfect or his spectacles at hand.

In the case of *Dinsmore v. Stimbert*, ante p. 433, we have had occasion to review the authorities to some extent, and in order to do so have made a thorough examination of them. And while such examination led to the conclusion that to enable a party to resist the payment of a negotiable note in the hands of a *bona fide* purchaser for value before maturity in the ordinary course of business without notice, on the ground that such note was procured by fraud and circumvention on the part of the payees, the promisor being led by such fraud and circumvention to believe that he was signing an entirely different kind and character of instrument, he must show that he is not chargeable with any laches or negligence or misplaced confidence in others. But all the cases which lead to this conclusion lay much stress on the fact that the present holder of the note is absolutely innocent of any participation in fraud himself, and of knowledge of it in others.

The point is also made by plaintiffs in error that the verdict is not sustained by sufficient evidence. There is certainly a conflict of testimony. It was a matter of impossibility for the jury to believe all the testimony. It is not for this court to say which was the most probable statement, that of the plaintiff, or that of the witnesses for the defendants. It was peculiarly the duty of the jury to sift and compare these conflicting statements and arrive at the truth as best they could. And we cannot say that they are not fully sustained by the evidence in the conclusion which they reached.

The other point stated in the petition in error not being insisted on by plaintiffs in error in their brief, nor alluded to at the hearing, will be regarded as abandoned by them. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

12 446
34 232**HENRY B. STRONG, PLAINTIFF IN ERROR, v. SAMUEL IRWIN,
DEFENDANT IN ERROR.**

Proceedings in error: ESTOPPEL. After verdict and judgment for the plaintiff, in an action of ejectment, the defendant brought on a hearing in the same cause, in the nature of a claim, to ascertain the amount of taxes paid by him on the land in controversy, praying for a foreclosure thereof, etc. The same having been found by the court and a judgment rendered therefor in favor of the defendant, the money was paid into court thereon by the plaintiff and paid to, and received by, the defendant, who now seeks relief by proceeding in error against the judgment in the original action. *Held*, That he is estopped, and the writ of error dismissed.

MOTION to dismiss proceedings in error, in case from Otoe county.

J. L. Mitchell, (*E. J. Murfin* with him), for the motion.

Covell & Ransom, for defendant in error.

COBB, J.

It appears, that after the verdict and judgment for the plaintiff in the court below, a hearing was had to ascertain the amount of taxes paid by the defendant on the lands in controversy. Upon such hearing it was found by the court that the said defendant had paid taxes on said premises amounting with interest to the sum of eight hundred and twenty dollars and sixty-seven cents, and a judgment was duly entered declaring the said sum to be a lien upon the said lands, and ordering the plaintiff to pay the same with interest thereon to the clerk of said court, for the use of the defendant, within sixty days from the date of said judgment, and in default thereof that said lands be sold as upon execution, etc.

The journal entry of said judgment also recites that

the said defendant, by leave of court first had, withdraws his motion theretofore filed for the empaneling of a jury to assess the value of improvements under the occupying claimants act.

It also appears, that on the 31st day of December, 1881, and within less than sixty days from the date of said judgment, Jane Y. Irwin, for and on behalf of the said plaintiff, paid to the clerk of said court the said sum of \$820.67, together with \$2.46 interest thereon, and that on the 2nd day of January, 1882, the said money was by the clerk of said court paid to, and received by, the said defendant.

In the case of *Buchanan v. Dorsey*, 11 Neb., 373, this court held that where a party in ejectment elects to proceed under the "act for the relief of occupying claimants," he is estopped from seeking relief by proceedings in error against the judgment in the former or principal action.

In the case at bar the defendant in the court below instituted proceedings in that court to recover the amount by him paid for taxes on the land from which he was evicted by the judgment in the former or original action, and not only recovered but actually received and appropriated it, and still seeks to attack the judgment by this proceeding in error.

The defendant in error having moved to dismiss the petition in error on the above grounds, his motion must be sustained, and the same is hereby dismissed.

JUDGMENT ACCORDINGLY.

12 448
16 877
16 698

WILLIAM VORCE, PLAINTIFF IN ERROR, v. ABRAHAM ROSENBERY, DEFENDANT IN ERROR.

Negotiable Instruments: EQUITABLE DEFENSE BY MAKER TO NOTE IN HANDS OF PAYEE. R. bought a lot of F. taking a warranty deed therefor, securing payment for the same by notes and mortgage. At the request of F. the notes and mortgage were drawn payable to W. V. It turned out that there was a prior mortgage on said lot, executed by F. to one I. M. P., which was foreclosed, the lot sold, and R. evicted therefrom. On suit brought by W. V. against R. on the notes, *held*, that the equitable defense by R. to such action was not cut off by reason of W. V. having received said notes from F. in payment of a pre-existing indebtedness.

ERROR to the district court for Douglas county. Tried below before SAVAGE, J.

Webster & Gaylord, for plaintiff in error, cited *Williams v. Rank*, 1 Ind., 230. *Justice v. Charles*, 7 Blackf., 122. *Railroad Company v. National Bank*, 102 U. S., 14. *Swift v. Tyson*, 16 Peters, 1-20. *McCarty v. Roots*, 21 How., 432, 438-9. *Heywood v. Watson*, 1 M. & P., 268. *Poirier v. Morris*, 20 Eng. L. & Eq., 103. *Atkinson v. Brooks*, 26 Vt., 569. *Quinn v. Hard*, 48 Vt., 375. *Russell v. Slater*, 47 Vt., 273. *Blanchard v. Stevens*, 8 Cush., 162. *Culver v. Benedict*, 13 Gray, 7. *Stoddard v. Kimball*, 6 Cush., 469. *Fisher v. Fisher*, 98 Mass., 303. *Roberts v. Hall*, 37 Conn., 205. *Cobb v. Doyle*, 7 R. I., 550. *Williams v. Little*, 11 N. H., 66. *Bowman v. Millison*, 58 Ill., 36. *Payne v. Bensley*, 8 Cal., 260. *Armour v. McMichael*, 36 N. J. L., 92. *Maitland v. Citizens Bank of Baltimore*, 4 Md., 540. *Valette v. Mason*, 1 Carter (Ind.), 288. *Bank of Charlestown v. Chambers*, 11 Rich. (S. C.), 657. *Boatman's Saving Institution v. Holland*, 38 Mo., 49.

Kennedy & Gilbert, for defendant in error, cited *Story* on Promissory Notes, secs. 104, 404, 438. *Johnson v.*

Weed, 9 Johns., 310. *Stevens v. Anderson*, 30 Ind., 391. 24 Pick., 21. *Welch v. Allington*, 23 Cal., 322. *Sheeley v. Maudeville*, 6 Cranch., 253. *Haines v. Pearce*, 41 Md., 223. *Summerville v. H. & St. Joe R. R.*, 62 Mo., 391.

COBB, J.

It appears from the pleadings and evidence in this case, that on or about the 21st day of January, 1873, George W. Forbes sold and conveyed by general warranty deed to Abraham Rosenberg lots five and six in Forbes' subdivision (an addition to the city of Omaha,) and received in payment therefor certain promissory notes amounting to \$1,788.44, secured by a mortgage upon the said lots. That the said lots were previously incumbered by a mortgage executed thereon, with other property, by the said Forbes to James M. Parker, to secure a certain sum, which said last mentioned mortgage was duly recorded. That afterwards the said Abraham Rosenberg sold and conveyed one of the said lots to Samuel Rosenberg; whereupon the said Rosenbergs applied to Forbes to make a change of securities, he giving up the old notes and cancelling the mortgage of Abraham Rosenberg, and taking in lieu thereof the separate notes and mortgages of the two Rosenbergs equally, each for his respective lot. This proposition was acceded to by Forbes, and the exchange was accordingly made, but at the suggestion of Forbes, and at his request, the new notes and mortgages were executed to and in the name of William Vorce, the plaintiff, but were delivered to George W. Forbes. That at said time the said Forbes was largely indebted to the said Vorce, and that he delivered said notes to the said Vorce in part payment of such indebtedness, as was claimed by the said Vorce, or as collateral security therefor, as was claimed by the said Rosenberg. This suit was brought by Vorce on those of the above notes given by Abraham Rosenberg. In the mean time, and before

the commencement of this suit, the said prior mortgage executed by Forbes to James M. Parker had been foreclosed, the said lots five and six sold, and the said Rosenberys evicted therefrom.

The defendant in the court below answered, setting up the said eviction and failure of the consideration of the said notes, and charged the plaintiff with notice, etc.

Upon the trial several questions were raised upon the admission of testimony, instructions to the jury, etc. The verdict and judgment being for the defendant, these questions are all saved by a motion for a new trial by the plaintiff, which being refused, they are presented to this court on error.

These questions, although presented in several forms, are reducible to one single proposition on the part of the plaintiff in error, to-wit: "He, the plaintiff, received the notes before maturity for value in the usual course of business, without notice of infirmity in their consideration, or of any defense thereto by the maker."

The only evidence before the jury applicable to the question of notice, or as to whether the notes were received by Vorce in the usual course of business, is that contained in the body of the notes themselves—they being payable "to William Vorce or order."

The argument of counsel for the plaintiff in error, as well as most of his citations of authorities, is based upon the idea that the true solution of this case turns upon the question decided in *Swift v. Tyson*, 16 Peters, 1, and the cases following it. But we cannot see that the point decided in that case is at all conclusive of the case at bar. This court has not, to the knowledge of the writer, been called upon to decide the point—upon which there is great conflict of authority—whether or not a negotiable note, transferred before due in the regular course of business to a creditor in payment of or security for a pre-existing debt, is taken in good faith and for a valuable

consideration and is collectible in the hands of the creditor, notwithstanding any equities existing between the original parties thereto. Nor will it be necessary to do so in this case. The notes sued on here, although negotiable, were never negotiated, nor were they transferred to the plaintiff in error in the usual course of business. The defendant in error testified on the stand that he had never seen Mr. Vorce when the notes were executed, had never had any dealings or business transactions with him; he was not present. So we think that the making of these notes payable to Mr. Vorce, under the circumstances, was a very unusual business transaction. And that the offer to transfer them by Forbes to Mr. Vorce—if such was the case—in payment of, or security for a pre-existing debt from the former to the latter, might well have caused suspicion and elicited inquiry as to the consideration for which the notes were given.

Again, had the notes been drawn payable to G. W. Forbes or order, and endorsed and delivered by him before maturity to William Vorce, their possession by him would be *prima facie* evidence not only of his ownership, but that the same had been by him received for a valuable consideration, in the usual course of business, and without notice of any equities between the maker and payee. But no such presumption arises from his possession of notes of which he himself is the payee, other than the presumption of ownership.

Having carefully examined all of the numerous authorities cited by counsel, we find not one which cuts off an equitable defence on the part of the principal maker to a note in the hands of the payee. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

12	452
18	583
20	94
18	452
27	144
12	452
57	416
12	452
62	259

E. J. HAINER, PLAINTIFF IN ERROR, v. ISAAC T. LEE,
DEFENDANT IN ERROR.

Replevin: DAMAGE. In an action of replevin, where the property claimed had not been taken and the action having proceeded as one for damages only, the jury found the right of property and right of possession of said property, when the action was commenced, in the plaintiff, etc. *Held*, That the measure of damages was the value of the property as proved, together with lawful interest thereon from the date of the unlawful taking thereof by the defendant to the first day of the term of court at which the trial was had.

ERROR to the district court for Hamilton county. Tried below before Post, J.

Austin J. Rittenhouse, for plaintiff in error.

J. S. Miller and J. H. Smith, for defendant in error.

COBB, J.

The defendant in error sued the plaintiff in error before a justice of the peace to recover a stove. The return of the officer on the writ of replevin showed that the property could not be found, and the case accordingly proceeded as one for damages only. Upon the trial the justice made no special finding, but rendered judgment for the plaintiff for \$35.00, the value of said property, and ten dollars damages for the wrongful detention of the same, and costs. On appeal to the district court the verdict and judgment were for the plaintiff in the sum of \$35.00. The defendant brings the cause to this court on error. The errors assigned are numerous, and will be stated and disposed of in their order.

1. That the court erred in overruling the motion filed by plaintiff in error to dismiss the appeal, on the ground that there was no judgment in the justice's court from which an appeal would lie.

By referring to the record we find that this was a motion to dismiss the cause, and not to dismiss the appeal. It is once recited in the journal entry as a motion to dismiss the appeal, but the motion itself as given in the record, as well as the recital in the motion for a new trial, show it to be a motion to dismiss the cause. Such being the case, whatever might have been the right of the plaintiff in error to dismiss his appeal—and as to that we express no opinion—the motion was correctly overruled.

2. The court erred in refusing to give the first instruction asked for by the plaintiff in error, which instruction is in words as follows: "If you find from the evidence that the defendant at the commencement of this action was not in the possession of, and had no control over, the stove, you will find for the defendant."

There is a conflict of authority on the point whether this action can be maintained where the defendant, once having the possession of the chattel, has parted with such possession and all control over it, before the suit is brought. While the weight of authority probably is to the contrary, yet, in order to defeat a recovery on that ground, the parting with possession must be real and *bona fide*, and not simulated or constructive.

In the case at bar the testimony of plaintiff in error, on his own behalf, on cross examination, was as follows:

Q. You purchased the stove, did you at the sale?

A. I had it purchased for me.

Q. It was for you the stove was bought?

A. Yes, sir.

Q. And it was delivered to you here?

A. Yes, sir.

Q. And you took it out to your farm?

A. Yes, sir.

Q. Your sister was living there, was she?

A. Not at the time I took it out.

Q. You left it there with your sister?

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A. I told you about that. I had my arrangements with my mother and the family fixed to come out from Iowa. I owned the farm and was to fix it up for them. And part of the folks came out, I think in March, my brother and sister and her child, and shortly after they came I moved out a portion of the furniture, and among other things that stove, and turned it over to them. Mother came shortly after that, and I then took out the balance of the furniture.

Q. What time in March was this conversation that you had in my office? (meaning the office of the attorney for the plaintiff.)

A. I don't know. I should say early in March, I think three or four days after the stove had been moved out to the farm. It might possibly have been in February.

Q. Was the stove moved out to the farm before Lee made the demand of you for it?

A. Yes, sir.

Q. At the time he made the demand for the stove in the bank you had no possession or control over it, did you?

A. No, sir.

Q. Then why did you refuse Mr. Lee in the way you did? You say you had no control over the stove at that time. Did you not swear that his demand was refused?

A. Yes, sir, it was.

Q. Is it not a fact that during the conversation in my office at the same time you said you proposed to stand by the stove and defend it?

A. I don't think I did. I don't think that came up at all, but of course I should have done so if it was attempted to take away the stove. * * I don't think the word ownership or possession was mentioned, but that I had nothing to do with the stove; it was on the farm and sister was sick and I did not want any one to go and re-

move the stove under the circumstances, and for that reason I was willing to try the case in any court in the county, and give a bond to any amount to the plaintiff he might name.

"The purpose of instruction," says Proffatt (Trial by Jury, Sec. 811) "is to give to the jury a statement of the law applicable to the particular case, to declare what presumptions of law are applicable to the facts, and to declare the legal effect of certain evidence." An examination of the whole testimony in the case, particularly that of the plaintiff in error above set out, satisfies us that the law of the instruction prayed is not applicable to the particular case then before the court and jury, and that the same was properly refused.

4. The court erred in refusing to give the fourth instruction asked for by the plaintiff in error, which was as follows: "In case you find for the plaintiff, the measure of damages shall be the value of the stove and fixtures in question, with the addition of lawful interest on such value, from the date of the taking to the first day of the term of court." This instruction was correct, but to justify a reversal, for a refusal to give an instruction, such instruction should be correct in every particular.

5. The court erred in giving the second instruction asked for by the defendant in error, which instruction is as follows: "And if you further find from the evidence that the defendant unlawfully detained the property in controversy, then you will find for the plaintiff the value of the property and affix the damages for the wrongful detention of the same."

Section 193, Comp. Stat., page 554, provides that: "Where the property claimed has not been taken, or has been returned to the defendant by the sheriff for want of the undertaking required by section one hundred and eighty-six, the action may proceed as one for damages

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only, and the plaintiff shall be entitled to such damages as are right and proper," etc.

The only significance which can be ascribed to the latter clause of the above section as quoted, is to make the former provision apply to all cases, whether the plaintiff claims general ownership of the property or only a special interest in or lien upon it. It could not have been the intention of the legislature to leave the question of the measure of damages in that, or any class of cases, to the sense of justice and propriety of the jury. The law fixed the measure of damages applicable to this case as hereinbefore stated, and so much of the said instruction, as tells the jury "to affix the damages for the wrongful detention of the property" to its value, is erroneous, and probably misled the jury to render their verdict for excessive damages.

6. The court erred in giving the first instruction given by the court on its own motion, which instruction was in words as follows: "In this action the property has not been taken from the defendant. The law provides that when the property claimed has not been taken from the defendant the action shall proceed as one for damages only and the plaintiff shall be entitled, if at all, to such damages as shall be just and proper."

The instruction is merely a statement of the substance of a section of the statute, and cannot be said to be erroneous.

7. The court erred in giving the third instruction given by said court on its own motion, which instruction was as follows: "If Lee purchased the stove in good faith, paying at the time the purchase price without knowledge of any intent on the part of Sheridan to defraud his creditors, Lee would acquire a good title to the property."

This instruction is not at all inconsistent with the section of the statute cited by plaintiff in error, section 11, chapter 32, Comp. Stat. 237. "Every sale made by a

vendor of goods and chattels in his possession or in his control, and every assignment of goods and chattels, by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the thing sold, mortgaged, or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the person claiming under such sale or assignment that the same was made in good faith and without any intent to defraud such creditors or purchasers."

It would have been quite proper for the court to have given this section in charge to the jury in connection with the charge given, and we must presume that he would have done so had it been embraced in the prayer of the plaintiff in error. But, it not having been asked, it was not error in the court to fail to give it.

8. There is error in the record and judgment in said cause, in this: That the damages awarded in said cause were excessive, appearing to have been given under the influence of passion or prejudice.

The damages are clearly excessive, although the defendant himself testified at the trial that the stove was worth \$35.00. He also stated that his damages were \$10.00, "counting everything a good deal over that." This testimony was let in over the defendant's objection, and as we have seen, in discussing another branch of the case, ought to have been excluded. The price paid for the stove by the plaintiff was \$25.00, and it is quite evident that the jury took that as the true value of the stove, and by adding to that sum the ten dollars damages sworn to by plaintiff, they arrived at the amount of their verdict, \$35.00, and this was consistent on the part of the

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jury under the erroneous instructions heretofore considered.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

HERMAN D. EINSPHAR ET AL., AS TRUSTEES OF THE FIRST GERMAN LUTHERAN ZION CHURCH, OF ADAMS COUNTY, APPELLANTS, v. FREDERICK WAGNER, APPELLEE.

Pleading: PETITION. The petition of the plaintiffs, the substance of which is set out in the opinion, *held*, to state facts sufficient to constitute a cause of action on the part of the plaintiffs against the defendants.

APPEAL from Adams county. Tried below before GASLIN, J.

C. H. Tanner, for appellants.

Laird & Smith, for appellee.

COBB, J.

The petition alleges that the plaintiff is a duly organized corporation under the laws of the state of Nebraska. That at a meeting of the members of said corporation, on the 11th day of February, 1878, certain officers of said corporation were duly elected, among the rest the defendant was elected treasurer and trustee for two years. That at said meeting the trustees were instructed and empowered by said corporation to purchase forty acres of school land on twenty years time, at 6 per cent. interest, said land to be the common property of said corporation, and to be held for the use and benefit of said corporation, for church and cemetery purposes. That at a subsequent meeting of said corporation, held on the 20th day of said

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month of February, it was unanimously resolved that the corporation purchase the south-west quarter of the north-west quarter of section 36, township 7 north, of range 12' west. That the trustees of said corporation, in accordance with the instructions given by the said plaintiff at the said meeting, did go to the county treasurer's office of Adams county, Nebraska, for the purpose of purchasing for the said plaintiff the said land. That the defendant was then one of the trustees, and was then and there present for the purpose aforesaid. That said trustees were then and there informed by the county treasurer of Adams county that the contract for the purchase of said land from the state could not be made with them, as a board of trustees, for the benefit of said plaintiff corporation, neither could said contract be made with one of them, as trustee of said corporation, but that the contract with the state could only be made with an individual, and in an individual capacity. That thereupon the plaintiff appointed, authorized, and empowered the defendant, the then treasurer and trustee of the plaintiff, to act for and in behalf of the plaintiff, and to make an individual contract with the state of Nebraska for the purchase of said land for the plaintiff upon the following conditions, to-wit: That at such time as the plaintiff should pay for said land in full, and release said Frederick Wagner from all personal liability on his contract with the state for the purchase of said land, then and in that event the said defendant was to present his contract for the purchase of said land to the proper authorities, procure a deed thereon to said land, and convey the same to the plaintiff, as will more fully appear from a copy of said contract, which is as follows: "It being impossible under the law for the whole board of trustees of the Evangelical Lutheran Zion Church N. A. C., to purchase the forty acres of land embraced in the * * * as the property of the congregation, I, F. Wagner, trustee, have bought the same in my

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name for the congregation, who approve of the transaction. And furthermore, because of my name being used only in the contract and nothing appearing relating to congregation property as such, I, F. Wagner, promise and herewith bind myself, successors, and guardians, to have issued a deed to the First Established Evang. Luth. Zion Congregation N. A. C., of Adams county, Nebraska, as soon as the above described forty acres of land shall have been paid for in full by same, and the contract be fulfilled.

Done in the year of the Lord 1879, on the 14th day of April, in presence of the congregation,

(Signed.) FREDERICK WAGNER,

AUGUSTA WAGNER.

Witness :

HERMAN EINSPHAR,

JOACHIM HUCKFELDT.

Plaintiff further says, that on the 7th day of January, 1878, Frederick Wagner, said defendant, was the treasurer of this plaintiff, the said corporation, and as such treasurer did make a payment on said land for said plaintiff, and with money belonging to this plaintiff, the said corporation, twenty-eight dollars, as one-tenth of the principal of said land, and fourteen and 44-100 dollars advance interest on said land, to-wit: * * * * That said defendant, as treasurer of this plaintiff, did on the 9th day of January, 1879, pay out of the funds and moneys belonging to said plaintiff the sum of fifteen and 12-100 dollars as advance interest on said land. That on the 7th day of January, 1880, the said Frederick Wagner, as the treasurer of the plaintiff, did pay out of the funds and moneys belonging to this plaintiff the sum of fifty-two dollars as principal on said land, and the further sum of twelve dollars advance interest on the same. Plaintiff further says, that on the first day of June, A. D. 1880, there was due to the state of Nebraska the sum of two hundred dollars, which sum of money has been paid by this plaintiff, the said corporation, to the county treas-

urer of Adams county, and that said payment has been made by said plaintiff out of money and funds belonging to said plaintiff, the said corporation. That said land is paid for in full, and there is nothing due to the state of Nebraska thereon, and that the plaintiff, the said corporation, has paid for said land all the principal and interest with money belonging to the plaintiff, the said corporation. That the plaintiff, the said corporation, delivered to the said defendant, the said Frederick Wagner, the receipt of the county treasurer of Adams county, Nebraska, for the final payment for said land by the plaintiff, and also the contract of said Frederick Wagner, the said defendant, made and entered into by said defendant with this plaintiff, and demanded of him, the said Frederick Wagner, defendant, to procure title to said land from the state of Nebraska, and to convey the same to this plaintiff, the said corporation, in accordance with the terms and agreements of the said contract made with this plaintiff. That said defendant refused and still refuses to accept said receipt of said county treasurer, and refused and still refuses to procure title to said land, and refused and still refuses to convey the said land to this plaintiff, the said corporation, either by assigning his contract for the purchase of said lands to this plaintiff, or in accordance with the terms of his agreement with this plaintiff, the said corporation. That the said defendant refused and still refuses to act in any manner whatever for the benefit of this plaintiff, the said corporation. Plaintiff further says, that the said defendant, Frederick Wagner, has no interest in said land other than that of a member of the corporation, the said plaintiff, that said contract made on the 17th day of January, 1878, for the purchase of said land from the state of Nebraska by the said defendant, was not made in behalf of said defendant Frederick Wagner, as it purports to be, but was made by the said defendant, Frederick Wagner, in behalf and for the use and benefit

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of the plaintiff, the said corporation, and as the agent and trustee of the said plaintiff. That all of the acts of the said defendant in relation to the said land have been done by virtue of his office as treasurer and trustee of the plaintiff, the said corporation, and under the control and management of the plaintiff, the said corporation, and by virtue of an authority delegated to him by the plaintiff, and that in no other manner whatever has the said defendant exercised any control or management over said land. Plaintiff further says, that the plaintiff, said corporation, now has full possession and control of said land, and has had full possession and control thereof ever since the defendant, Frederick Wagner, contracted for the purchase of the same from the state of Nebraska. That the said defendant has not now, neither has he ever had, possession or control of said land since his contract for the purchase of the same, but that the same has at all times since been held and controlled by the plaintiff, the said corporation. Plaintiff further says, that the said defendant has failed to comply and refuses to comply with the terms of the contract and agreement entered into by him on the 14th day of April, 1879, with this plaintiff, the said corporation, and for its use and benefit. That the plaintiff, the said corporation, has fully complied with the conditions of the said contract and agreement on its part. Wherefore plaintiff prays for the following judgment and relief: That a decree be entered directing said defendant, Frederick Wagner, within ten days after the rendition of the decree to present to the county treasurer of Adams county, Nebraska, his original contract with the state of Nebraska, for the purchase of said land, and demand a deed for said land, conveying the same to this plaintiff. In case the said defendant, Frederick Wagner, shall neglect and refuse to present said contract to said county treasurer, and procure a deed conveying said land to the plaintiff, then and in that event, the sheriff of Adams

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county be directed to present a copy of this decree to the county treasurer of Adams county, Nebraska, and upon a deed being properly executed conveying said land to this plaintiff, the contract executed by the said defendant, Frederick Wagner, with the state of Nebraska, on the 17th day of January, 1878, for the purchase of said land, shall be cancelled, and such conveyance to said plaintiff shall be taken as a full and complete performance on the part of the state of Nebraska, party to said contract, and that the plaintiff have such other and further relief as equity and justice may require, together with costs, etc.

The above is the substance of the petition, leaving out the proceedings of seven meetings of the corporation, and some other matters, which probably would have been stricken out as redundant matter had a motion to that effect been made in the district court. The defendant filed a general demurrer, which was sustained by the court. The plaintiffs, electing to stand by their petition, the same was dismissed and a judgment for costs rendered against the plaintiffs, who bring the cause to this court by appeal.

There being no brief on either side, we are quite at a loss for grounds on which the district court acted in sustaining the demurrer. From a perusal of the petition, we fail to see in what respect it fails to state a cause of action, on the part of the plaintiffs, against the defendant; but, on the contrary, it seems quite clear to us that, upon proof sustaining the case as stated in the petition, the plaintiffs will be entitled to the relief prayed for. The decree of the district court is therefore reversed, and the cause reinstated, and remanded to the district court for further proceedings in accordance with law.

DECREE ACCORDINGLY.

12	464
15	360
17	269
19	464
28	378
12	464
40	128
40	340
41	19
19	464
42	877
12	464
46	918
12	464
50	659
53	408
12	464
56	386
12	464
62	642

OLIVER STEVENSON, PLAINTIFF AND APPELLEE, v. WILLIAM R. CRAIG ET AL., DEFENDANTS AND APPELLANTS, AND JAMES SWEET, PLAINTIFF AND APPELLANT, v. WILLIAM R. CRAIG ET AL., DEFENDANTS AND APPELLEES.

1. **Married Women: MORTGAGE TO SECURE HUSBAND'S DEBT: STATUTE OF LIMITATIONS.** W. R. C. and R. S. C., husband and wife, executed a mortgage to R. M. R., to secure the payment of a loan of money from R. M. R. to W. R. C., as evidenced by the note of W. R. C. to the order of R. M. R., due Jan. 15, 1869, on their homestead, which was the separate property of R. S. C., the wife. Several payments were made on said note, the last one being on the 22d day of February, 1870. On the 1st day of April, 1876, W. R. C. executed on the back of said note an acknowledgment of indebtedness thereon, to the amount of \$2,072.93, with interest from June 1, 1871, and agreeing to pay the same within one year from the date of such acknowledgment. Suit to foreclose said mortgage commenced by J. S., assignee of R. M. R., July 31, 1880; *held*, that the answer of R. S. C. setting up the statute of limitations was properly sustained.
2. ———: ———. On the case above stated, also *held*, that R. S. C. and her separate property therein described were, before the running of the statute, in equity bound for the debt secured by the said mortgage.
3. **Statute of Limitations: FORECLOSURE OF MORTGAGE.** An action for the foreclosure of a mortgage upon real estate may be brought at any time within ten years after the cause of action accrued. *Hale v. Christy*, 8 Neb., 264, adhered to.

OLIVER STEVENSON brought an action in the district court of Otoe county, on the 24th of June, 1880, to foreclose a mortgage executed May 23, 1870, and due six months thereafter, by William R. Craig, and Rowena S. Craig, his wife, to said Stevenson, to secure a note of William R. Craig of that date. The title to the property covered by the mortgage was in the wife, and the same was claimed by her as her separate property. James Sweet was made a defendant, and filed an answer therein, as well as a petition and cross bill against Stevenson, the Craigs, and other defendants, setting up

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the execution of a prior mortgage on the same property, by the said Craigs, to secure a note of William R. Craig, dated Sept. 15, 1868; setting up also payments on said note at different times, and an acknowledgment by W. R. Craig of the amount due on the note, April 1, 1876, claiming that the said mortgage was the prior lien on said premises; and asking for a foreclosure thereof, etc. Both transactions were consummated before the taking effect of the act of 1871, relative to the rights of married women in Nebraska. By order of court the two actions were consolidated, and upon a trial thereof before Pound, J., the court found in favor of said Stevenson on his note and mortgage, against Sweet on his note and mortgage, that same was barred by statute of limitation, etc., and decree accordingly. Sweet and the Craigs appeal.

Covell & Ransom, for appellant Sweet.

As to validity of mortgage by wife prior to act of 1871, see sec. 47, R. S., chap. 48. As to defense of suretyship, cited *Dickinson v. Codwise*, 1 Sand. Ch., 214. *Gahn v. Niemcewicz*, 11 Wend., 312. *Niemcewicz v. Gahn*, 3 Paige Ch., 614. As to statute of limitations, contended that the mortgage having been given prior to amendment of statute in 1869, action thereon could have been brought at any time within twenty-one years. R. S., sec. 6, code. *Wilson v. Richards*, 1 Neb., 342. But even if the ten years statute applied, the acknowledgment of Craig of the amount due April 1, 1876, would prevent statute from running. Furthermore, as to statute of limitations, cited *inter alia*, *Schmucker v. Sibert*, 18 Kan., 104. 2 Jones on Mortgages, sec. 1211. *Sichel v. Carillo*, 42 Cal., 493. *Joy v. Adams*, 26 Maine, 333. *Thayer v. Mann*, 19 Pick., 535.

Watson & Wodehouse, for appellants Craigs.

Sec. 47, chap. 48, R. S., did not give Mrs. Craig power to make contract of suretyship. Baylies on Sureties, 42.

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Brandt on Suretyship, sec. 4. *Perkins v. Elliot*, 23 N. J. Eq., 526. The mortgage to Stevenson is barred. *Schmucker v. Sibert*, 18 Kan., 176. *Fort Scott v. Schulenberg*, 22 Id., 648. And see also *Hubbard v. Ogden*, 22 Kan., 363.

S. H. Calhoun, for appellee Stevenson.

As to power of wife to mortgage separate estate to secure husband's debt. 1 Jones on Mortgages, sec. 113 and cases cited. 1 Hilliard on Mortgages, chap. 1, secs 6-9. *Campbell v. Tompkins*, 10 Reporter, 537. The wife is surety and extension of time releases her mortgage. *Hubbell v. Osborn*, 22 Kan., 363, and cases cited. *Jaffray v. Crane*, 7 N. W. Rep., 301.

COBB, J.

There are three principal questions presented by the record in this case.

First. Was the defendant, Rowena S. Craig, and her sole and separate property therein described, bound by the mortgages to Rollin M. Rolfe and Oliver Stevenson?

Second. Is the mortgage to Rollin M. Rolfe barred by the statute of limitations?

Third. Is the mortgage to Oliver Stevenson barred by the statute of limitations?

It is conceded that the title to the mortgaged premises was and is in the said Rowena S. Craig, although some evidence was introduced tending to prove that it was in reality the property of William R. Craig; that the lots were given to him as an inducement to leave his former place of residence in a neighboring state and remove to Nebraska City, and engage in manufacturing brick. It is also alleged that he was then indebted to a considerable extent and did not dare to hold real estate in his own name. If all of this is true, none of the parties to this action are in a position to take advantage of it. All of Craig's indebtedness to any or either of them has arisen long since the title to the lots was placed in Mrs. Craig,

and was a matter of public record, besides being personally known to them. If the proprietors of the infant city, for the purpose of inducing her husband to take up his residence there, and engage in manufacturing, saw fit to donate to Mrs. Craig lots for a family homestead, the receipt of such donation by her, and its retention and use by the family, was no fraud, and neither the then present or future creditors of Craig have any right to complain.

In deciding the case of *Demarest v. Wynkoop*, 8 Johns. Chy., 129, Chancellor Kent in 1817 said: "There is no doubt that a wife may sell or mortgage her separate property for her husband's debts. Her deed under her separate examination, before a competent officer, is as valid with us as if she passed her estate by fine at common law. Nor do I perceive any objection to her competency to create a power in the mortgagee to sell in default of payment. If she can convey upon condition, she may prescribe the terms; and it is fit and convenient that the mortgagor should be able to confer the power." This decision was made long before the legislation of that state, conferring additional powers upon married women in reference to the management and disposal of their separate property, and was made upon the authority of common law cases therein cited.

In the case of *The Fireman's Insurance Company of Albany v. Bay*, 4 Barb., 407, (1848), the court say: "And in all cases where the wife has a separate estate, no matter how it was created, it may be made liable to the payment of her note or bond given on the credit of it, and she has in equity the same power over it, and may sell it or bind it by mortgage, as if she were a *feme sole*."

In the case of *Robbins v. Abrams*, 1 Halsted Chy., 465, decided in 1846, the court of errors and appeals of New Jersey held as follows: "A husband bought real estate and directed that the deeds therefor be made to another,

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in trust for his wife and her heirs * * The trustee and the wife afterwards executed a mortgage of the land to secure a debt due from the husband, and the mortgage was duly acknowledged by the wife. Held, That the mortgage was good." And this upon the general principles of the common law.

In the case of *Smith v. Osborn*, 33 Mich., 410, Ch. J. Cooley, delivering the opinion of the court, says: "The consideration of the mortgage which is in controversy in this suit was the purchase price of certain goods bought by Martin C. Osborn of complainant, and also an old indebtedness of a few hundred dollars owing by him to complainant. The mortgage is upon property owned by Emeline C. Osborn, who is the wife of the other defendant, and was given by her at her husband's request. She defends the foreclosure, claiming to have been defrauded when her signature was obtained. The alleged fraud consisted in the husband soliciting and obtaining the consent of the wife to the mortgage of her property, to secure the purchase price of the goods, and then, without her knowledge, making it cover the old indebtedness also * * and this deception it is insisted was a fraud which entitles Mrs. Osborn to avoid the mortgage! The claim of the defense cannot be sustained to the full extent. So far as the security was agreed upon by Mrs. Osborn it must be supported * * Mrs. Osborn has all the relief she is entitled to, if she is relieved to that portion of the sum included in the mortgage which it was wrongfully made to cover." This decision also rests on common law authorities, and in no degree upon any statute enlarging the powers of married women.

Those authorities and many others cited by counsel, lead to the conclusion that the defendant, Rowena S. Craig, and her separate estate therein described, were bound by the said mortgages.

As to the second point: It appears by the record that

the mortgage to Rollin M. Rolfe was executed on the 15th day of September, 1863, to secure a note falling due January 15th, 1869. There are four payments endorsed on this note, the last being a payment of interest on the 22nd day of February, 1876, more than a year after the statute had run on the note. W. R. Craig executed on the back of said note an acknowledgment of indebtedness thereon to the amount of \$2073.03, with interest from June 1, 1871, and agreeing to pay the same within one year from that date. Rowena S. Craig took no part in any of these payments or this acknowledgment. Indeed she does not appear in the transaction at all, from the acknowledgment of the mortgage to the making of her answer in this case. The relation which she bore to the note and debt now under consideration was that of security to the extent of her property mortgaged. Being security, she possesses all the rights, and her obligation is accompanied by all the limitations attaching to that relationship. In addition to authorities cited by counsel, see *Dennison v. Gibson*, 24 Mich., 167.

In the case of *Hale v. Christy*, 8 Neb., 264, the majority of this court held that "An action for the foreclosure of a mortgage upon real estate may be brought at any time within ten years after the action accrued." The cause of action accrued against Rowena S. Craig, January 15th, 1869. She was sued in the cross action July 31, 1880. In her answer thereto she sets up and pleads the statute of limitations, and although the cross-pleading defendant, James Sweet, the owner of the said mortgage, made and filed a reply to her said answer, he alleges no fact tending to show that she ever made any subsequent promise, or assented to the subsequent promise made by the said William R. Craig, or did any other act or thing to take the said mortgage out of the statute. Turning to the evidence as taken by the referee, we find no evidence of any new promise or waiver on the part of

the said Rowena S. Craig to estop or prevent her from claiming the protection of the statute. The conclusion is therefore irresistible that the said mortgage, so far as Rowena S. Craig and her separate property are concerned, was barred by the statute of limitations at the date of the commencement of this suit.

Third. The mortgage from William Craig and Rowena S. Craig to Oliver Stevenson was executed the 23rd day of May, 1870, to secure a note due six months after said date; that is to say November 23, 1870. The suit was commenced on the 24th day of June, 1880. It is only necessary to state these dates to show that under the decision in *Hale v. Christy, supra*, this mortgage was not, at the commencement of the suit, barred by the statute of limitations. It is therefore only necessary to say in this connection that the law of that case is adhered to.

Viewing the law applicable to this case, as above stated, we deem it quite unnecessary to discuss the other questions presented by the pleadings and evidence. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

12 470
15 501

12 470
43 224

12 470
47 821

12 470
51 858

12 470
58 102

THE STATE OF NEBRASKA, EX REL. JOHN O. JOHNSON,
v. R. L. CORNWELL, CITY CLERK OF CRETE.

Intoxicating Liquors: LICENSE FEE: PAYMENT. The relator paid the necessary fee for a license to sell intoxicating liquors in the city of Crete, and a formal one was issued. Through the omission of the corporate authorities to take certain steps required by the general license law, the license was void. Subsequently the required steps were taken, whereupon the relator applied for a license on the credit of his former payment, and for the unexpired term for which he paid, so far as it would go. *Held*, That he was entitled to it.

Hartley v. Crawford.

ORIGINAL application for mandamus.

W. H. Morris, for relator.

LAKE, CH. J.

It appears that the relator paid his money into the city treasury, in good faith, for the purpose of procuring a license to sell spirituous liquors. A formal license was issued to him which, for the reason that certain requirements of the recently enacted general license law had not been complied with by the corporate authorities, was absolutely void. Those requirements have since been observed by the authorities, so that licenses may now be issued; and the question presented is, whether the relator is entitled to receive one for the unexpired term for which he paid, on the credit of his former payment, so far as it will go, the money not having been returned to him. We think that he is; and a writ of mandamus is therefore awarded, as prayed, requiring one to be issued accordingly.

WRIT AWARDED.

HENRY C. HARTLEY, PLAINTIFF IN ERROR, v. JOSEPH R. CRAWFORD, DEFENDANT IN ERROR.

Limitation of Action. The provision in sec. 20, tit. II, of the code of civil procedure that: "If, when a cause of action accrues against a person, he be out of the state, * * * the period limited for the commencement of the action shall not begin to run until he come into the state," etc., applies to all personal causes of action, whether they accrue within, or without this state, or in favor of a resident or a non-resident thereof.

ERROR to the district court for Lancaster county. Heard below before POUND, J.

A. C. Ricketts, for plaintiff in error.*Burr & Kelly*, for defendant in error.

LAKE, CH. J.

The only question presented in this case is raised by a demurrer to the petition. It is whether at the time the action was brought it was barred by our statute of limitations.

The action is founded on a judgment in favor of Crawford and against Hartley, rendered by a justice of the peace in the state of Ohio, on the 21st day of June, 1875, and more than five years before the commencement of proceedings upon it here. Both parties were, at the date of the judgment, residents of Ohio, and ever since have continued to be non-residents of, and absent from this state. It is not claimed that the judgment is barred in Ohio, so that the question must be answered with reference solely to our own statutes upon the subject.

It is conceded by counsel that the decision of the question must turn upon the construction to be given to sec. 10, tit. II., of the code of civil procedure, together with any other modifying provision found therein. The real point of disagreement between counsel seems to be as to whether, in its application to the facts of this case, sec. 10 must be taken in connection with sec. 20 of the same title. Section 10 limits the beginning of "an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment" to "five years." If this were to be taken alone, of course the action would be effectually barred. But sec. 20 provides that: "If, when a cause of action accrues against a person, he be out of the state, * * * the period limited for commencement of the action shall not begin to run until he come into the state," etc. When this cause of action "*accrued*," which was at the date of the judgment in Ohio, the defendant was out of the state," and he has never come into it. He is therefore clearly within the letter, and we think the spirit also, of this provision. The con-

Brauer v. Luntzer.

struction contended for by counsel for the plaintiff in error that section 20 applies only to causes of action accruing in this state, "or in behalf of one of our citizens," would be exceedingly forced, and entirely unsupported, as we think, by reason or authority. The language of the statute is general, and applies to all personal causes of action to which a bar is provided in the preceding sections. If the legislature had intended that sec. 20 should only apply to causes of action arising in this state, or in favor of our own citizens, it is not at all likely that language of so general import would have been employed.

We are of the opinion that sections 10 and 20 must be taken together in judging upon the facts of this petition, and that under these the action is not barred.

JUDGMENT AFFIRMED.

ADOLF BRAUER, PLAINTIFF IN ERROR, v. LORENZO LUNTZER, DEFENDANT IN ERROR.

1. County Courts: JURISDICTION. County courts have jurisdiction of actions to recover damages for assault and battery, where the amount sought to be recovered does not exceed \$500.00.
2. ———: ———: SUMMONS. If the amount claimed does not exceed \$100.00, a summons should be issued and served in the same manner as in cases commenced before a justice of the peace.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Burr & Marshall, for plaintiff in error.

J. C. Johnston, for defendant in error.

MAXWELL, J.

On the first day of June, 1881, Luntzer filed a bill of particulars in the county court of Lancaster county, claiming damages therein against Brauer, for the sum of \$100.00, for injuries sustained from an assault and battery. A summons was issued and served on that day on Brauer, requiring him to appear on the 4th day of June, 1881, at 9 o'clock A. M. Brauer failed to appear at the trial, and judgment was rendered against him for the sum of \$75.00. He then took the case on error to the district court, where the judgment was affirmed. He now brings the cause into this court by petition in error. The errors assigned are: *First.* That the court had no jurisdiction. *Second.* That no proper notice by summons was given as required by law.

The questions presented are to be determined by the construction to be given the several sections of "An act concerning the organization, forms, and jurisdiction of probate courts," which took effect March 3, 1873. [Comp. Stat., Chap. 20.]

Section 1 provides: "That there is hereby established, in each organized county in this state, a probate court, which shall be held at the county seat by the probate judge of such county, and shall be a court of record. Such court shall be deemed to be always open, and any cause, matter, or proceeding may be proceeded with therein at any time after the giving of notice or service of process in the mode prescribed by law. And the proceedings and determinations of such court heretofore had or made in any cause, matter, or proceeding, at any time other than at a regular term of such court, as heretofore prescribed by law, shall be as valid and effectual, for all purposes, as if had or made at such regular term."

Section 2 provides that: "Probate judges in their respective counties shall have and exercise the ordinary powers and jurisdiction of a justice of the peace, and shall,

in civil cases, have concurrent jurisdiction with the district court, in all civil cases, in any sum not exceeding five hundred dollars, exclusive of costs; and in actions of replevin, where the appraised value of the property does not exceed that sum, and the provisions of the code of civil procedure, relative to justices of the peace, shall, where no special provision is made by this subdivision, apply to the proceedings in all civil actions prosecuted before said probate judges; *Provided*, That probate courts shall not have jurisdiction: I. In any action for malicious prosecution. II. In any action against officers for misconduct in office, except where like proceedings can be had before justices of the peace. III. In actions for slander and libel. IV. In actions upon contracts for the sale of real estate. V. In any matter wherein the title or boundaries of land may be in dispute, nor to order or decree the sale or partition or (of) real estate."

Section 8 provides that: "In all cases commenced in said courts, wherein the sum exceeds one hundred dollars, it shall be the duty of the probate judge to issue a summons, returnable on the first day of the next term of court, if there be ten days intervening between the issuance of the summons and the first day of the term, and if not, then to be made returnable on the first day of the next term thereafter, which summons shall be directed and delivered to the sheriff or any constable of said county, and the sheriff or constable shall serve the same upon the defendant as in other civil cases, at least ten days before the return day thereof. When the summons has not been served ten days before the first day of the term, the cause shall stand continued until the next regular term of said court, and shall then stand for trial, without further notice to the defendant."

It will be seen that the county court has jurisdiction in actions to recover damages for assault and battery. And this jurisdiction is not limited to cases where the sum

claimed exceeds \$100.00, the language being general and conferring jurisdiction of the subject matter without regard to the amount claimed. Where the sum claimed exceeds \$100.00, the bill of particulars must be verified in the same manner as a petition in the district court, and motions and demurrers are allowed, and the rules and practice concerning pleadings and process in the district court, so far as they are applicable, are permitted. But if the sum claimed does not exceed \$100.00, the rules of pleading and practice which prevail in justices' courts shall also be rules of the county court.

It is only in cases where the sum claimed exceeds \$100.00 that a summons is to be made returnable on the first day of the next or succeeding term. If the sum claimed does not exceed \$100.00, then a summons is to be made returnable in the same manner as if issued by a justice of the peace. The cause for this practice is found in the fact that at an early day in the history of this then territory, the legislature conferred on probate judges the ordinary powers and jurisdiction of justices of the peace. This power has been continued, but the legislature in providing for increased jurisdiction only regulated the procedure in cases where the sum claimed exceeds \$100.00, no change being made where the sum claimed is \$100.00 or less. In this case the sum claimed in the bill of particulars is \$100.00. The procedure therefore as to issuing, serving, and returning the summons is the same as in justices' courts. And as the summons contained the proper indorsement, was properly issued and served, the court had jurisdiction of the subject matter, and the parties. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

D. C. MCKILLIP AND H. C. PAGE, PLAINTIFFS IN ERROR, v.
JOHN CATTLE, SR., DEFENDANT IN ERROR.

Partnership: DISSOLUTION: LIABILITY OF PARTNERS. A firm was indebted to certain attorneys for legal services, and in an action for a dissolution of the firm a decree was rendered fixing the relative shares of the partners, finding the amount of the debts owing by the firm including the aforesaid services, and decreeing that one C., upon paying said debts and the share of the partners, should take the partnership effects. *Held*, That when C. took possession of the partnership effects he became liable to the attorneys for the amount allowed them in the decree.

ERROR to the district court for Seward county. Heard below before Post, J.

McKillip & Page, pro se.

St. Clair & Anderson, for defendant in error.

MAXWELL, J.

A demurrer to the petition was sustained in the court below and the action dismissed. The cause is brought into this court by petition in error.

The action is for services rendered by the plaintiffs as attorneys for the firm of Marchant and Jull. The plaintiffs, after setting out the service rendered and their value, allege that at the April term, 1878, of the district court of Seward county, in an action then pending therein wherein the defendant herein was plaintiff and Marchant & Jull defendants, it was decreed that said partnership between said Marchant & Jull should be dissolved, and the court found the relative interests of the partners and the amount of the firm debts, and entered a decree that the defendant herein should succeed to the interest of the partnership in the partnership effects upon paying into court the amount due each of said partners and the

amount of the indebtedness of said firm. It is also alleged that said claim of the plaintiffs was a part of the indebtedness of said firm, which the defendant was required to pay; and that the defendant took possession of said partnership effects, but has wholly neglected and refused to pay the plaintiff's claim.

The petition certainly states a cause of action. If the plaintiffs' claim was allowed as a debt of the firm of Marchant & Jull, and the defendant was to pay this indebtedness as a condition of taking possession of the partnership effects he cannot take the property without complying with the conditions upon which he was to obtain the same. This being the case he is personally liable to the plaintiffs.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

13	478
38	357
12	478
55	594

WALTER R. VAUGHN, PLAINTIFF IN ERROR, v. CHARLES O'CONNER, DEFENDANT IN ERROR.

County Courts: NEW TRIAL. A county court is governed by the same statute as a justice of the peace in granting a new trial, and must grant the same, if at all, within four days from the time of entering judgment.

ERROR to the district court for Douglas county. Tried below before SAVAGE, J.

Warren Switzler, for plaintiff in error.

O'Brien & Bartlett, for defendant in error.

MAXWELL, J.

A trial was had in this case in the county court of Douglas county, on the 14th day of Feb., 1880, and a

verdict rendered in favor of the plaintiff. The defendant then gave notice of a motion for a new trial, and three days thereafter filed a motion to that effect. On the 24th of that month he filed an affidavit in support of his motion, and on the 8th day of March of the same year filed a second affidavit in support of the same. The plaintiff then filed three affidavits in opposition to the motion. The cause was then submitted to the court, which granted a new trial. From this order the plaintiff took the case on error to the district court, where the judgment of the county court was affirmed. The cause is brought into this court by petition in error.

Sec. 983 of the code of civil procedure provides that: "It shall be lawful for the justice before whom a cause has been tried on motion, and being satisfied that the verdict was obtained by fraud, partiality, or undue means, at any time within four days after the entering of judgment to grant a new trial, and he shall set a time for a new trial, of which the opposite party shall have three days notice.

County courts are governed by the same provisions of the statute in granting a new trial as a justice of the peace. *Cox v. Tyler*, 6 Neb., 203. The question therefore depends upon the construction to be given to the section above quoted. The language is: "It shall be lawful for the justice * * * * * at any time within four days after the entering of judgment to grant a new trial," etc. The new trial is to be granted within four days, if at all. The authority of a justice of the peace or county judge to grant a new trial is derived wholly from the statute, and it must be exercised in the manner and within the time limited therein. *Cox v. Tyler*, 6 Neb., 297. *Fox v. Meacham*, Id., 530. The county court had no authority therefore, on the 8th day of March, to set aside a verdict rendered on the 14th day of February.

The judgment of the district court is reversed and also

R. V. R. R. Co. v. McPherson.

the judgment of the county court granting a new trial, and the verdict of the jury and the judgment of the county court thereon are reinstated.

JUDGMENT ACCORDINGLY.

12	480
17	178
19	896
20	543
20	546
12	480
39	423
19	480
44	140
12	480
60	819

REPUBLICAN VALLEY R. R. Co., PLAINTIFF IN ERROR, v.
MARY MCPHERSON, DEFENDANT IN ERROR.

1. **Appeal: NEGLIGENCE OF OFFICER.** Where a party entitled to an appeal uses diligence in endeavoring to perfect the same, the law will not permit him to be deprived of it through the neglect of the officer whose duty it was to prepare the transcript. *Dobson v. Dobson*, 7 Neb., 296, adhered to.
2. **Dismissal: PRACTICE.** Where an appeal has been dismissed in the district court, and it is desired to have the same reinstated, the proper practice is by motion in the same case, and not by an original action.

ERROR to the district court for Nuckolls county. Tried below before WEAVER, J.

Marquett & Deweese (C. B. Slocumb with them), for plaintiff in error.

D. W. Barker, for defendant in error.

MAXWELL, J.

This is an original action brought in the district court of Nuckolls county, by Mary McPherson against the Republican Valley R. R. Co., to obtain an order to reinstate an appeal, which had been dismissed by said court. A demurrer to the petition was overruled in the court below and the appeal reinstated. The railroad company brings the cause into this court by petition in error.

The petition states in substance, that certain real estate, (describing it), of Mary McPherson was condemned for right of way by the plaintiff on the 7th day of November, 1879; that no record of said proceeding was kept in the

office of the county judge of said county; that on the 22nd day of December, 1879, and at various other times, said Mary McPherson notified said judge of her intention to appeal said cause to the district court of said county, and she tendered to him the fees and demanded a transcript of said proceedings to file in said district court, but was unable to obtain the same; that on various pretexts, which are set out in the petition, the county judge neglected and refused to furnish said transcript until more than sixty days had elapsed from the time said land was condemned. It is also stated "that as soon as she possibly could procure a transcript from said county judge she did so, and handed the same to the clerk of the district court of said Nuckolls county, and that she has been guilty of no negligence in her endeavor to perfect her said appeal to the district court; that on account of the refusal of said county judge to make and deliver to her the said transcript, she was unable to file the same within the sixty days allowed by law," etc.

It is also stated that at the May term, 1881, of said court, said appeal was dismissed, because the transcript was not filed therein within sixty days. Two affidavits are also filed in support of said petition. The question to be determined is, did the district court err in reinstating the appeal? The petition and affidavits show diligence on the part of the appellant, and that she made every effort to perfect the appeal within the time limited by statute, but was prevented by the negligence, or failure to perform his duty, of the county judge. The case therefore falls within the rule laid down in *Dobson v. Dobson*, 7 Neb., 296, and is sufficient to entitle the party to an appeal.

The petition in this case was filed as in the commencement of an action. This was unnecessary. It is a proceeding in the same court to reinstate an appeal dismissed for cause. The procedure in such cases should be by

Travis v. Cooley.

motion to reinstate on notice to the adverse party. The motion may be supported or opposed by affidavits or other evidence. The petition in this case however being filed in the same cause, in the same court, to accomplish the purpose desired by a motion, will be considered as a motion, and the court did not err in sustaining it and reinstating the appeal. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

JOHN H. TRAVIS, PLAINTIFF IN ERROR, v. ALFRED S. COOLEY, DEFENDANT IN ERROR.

Verdict against evidence. Where the only error assigned is that the verdict is not sustained by the evidence, it will not be set aside, unless it is against the clear preponderance of the testimony.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Brown, Ryan & Brown, for plaintiff in error.

Burr & Marshall, for defendant in error.

MAXWELL, J.

This is an action to recover for one-half of a reaping machine. It is alleged in the petition in substance that on the — day of July, 1875, the defendant herein sold to James and Thomas Elliott a reaping machine for the sum of \$50.00, and that afterwards Thomas Elliott, being desirous of engaging in a different business, sold one-half of said machine back again to the defendant, who thereafter, with the assent of James Elliott, sold the same to the plaintiff. The answer consists of a statement that the plaintiff purchased one-half of the machine in ques-

Burr v. Hamer.

tion from James Elliott, and a denial of all the other allegations of the petition. On the trial of the cause a verdict was rendered in favor of Cooley. The defendant below brings the cause into this court by petition in error. The only error relied upon is that the verdict is not supported by the evidence. It is an established rule in this court, that where a verdict is unsupported by the evidence, or is against the clear and decided preponderance thereof, it will be set aside. But a mere difference of opinion between the court and jury will not justify the court in setting a verdict aside. The verdict or finding must be clearly wrong to justify an interference with it, and when the court merely doubts its correctness it will not be disturbed. In this case it is admitted that the plaintiff purchased one-half of the reaper, but it is claimed that he purchased the same from James Elliott. The only question in issue therefore is, from whom did he purchase? Upon this point the testimony is conflicting, but the weight of testimony seems to sustain the verdict. There is certainly no preponderance against it. There is no error in the record, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

ALDANA BURR, PLAINTIFF IN ERROR, V. ELLIS F. HAMER,
DEFENDANT IN ERROR.

1. **FENCES: COMMON LAW.** At common law, if one of two adjoining owners build a fence on the line between his own and an adjoining lot without an agreement that it shall be built at joint expense, he cannot recover from the latter one half of the value of the fence, even if he join his fence to such division fence.
2. ———: **STATUTE.** The statute in relation to partition fences and the mode of apportionment and procedure is exclusive.

Burr v. Hamer.

ERROR to the district court for Lancaster county. Heard below before POUND, J.

J. R. Webster, for plaintiff in error.

Mason & Whedon, for defendant in error.

MAXWELL, J.

A demurrer to the petition in this case was sustained in the court below and the action dismissed. The following is a copy of the petition :

Aldana Burr, plaintiff, complaining of Ellis P. Hamer, defendant, for cause of action says: This plaintiff on and prior to the first day of May, A. D. 1879, was in occupation and was the owner of lot 38, and the defendant, Ellis P. Hamer, at the time aforesaid was occupying and claiming to be owner of lot 37, all in Little's subdivision, of the west half of the southwest quarter of section 34, in township 10 north, of range 6 east of the sixth principal meridian in said county of Lancaster; that said lands are adjoining contiguous tracts; this plaintiff, prior to the date aforesaid, enclosed her said lands, and in doing so, constructed a division fence on the line between said lots, and the defendant, on or about the date aforesaid, enclosed his said lands, and in so doing connected his fences with the division fence constructed by this plaintiff, as aforesaid, making such division fence serve to enclose his adjoining lands, appropriating and using such fence as a division line fence; plaintiff further says that said fence when so appropriated was of the value of \$71.00, and the defendant by such appropriation thereby undertook and agreed and became liable to pay this plaintiff for one-half the value thereof at such time, to-wit: the sum of \$35.50, yet the said defendant, though often requested, has not paid this plaintiff said sum of money, or any part thereof, but is indebted to plaintiff in said sum, and interest from the said first day of May, A. D. 1879; wherefore

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plaintiff prays judgment against said defendant for the sum of \$85.50, and interest from the first day of May, A. D. 1879.

At common law a party was not required to fence against an adjoining close. Kent says: "In connection with this subject of party walls, may be mentioned the law concerning division fences between the owners of adjoining lands. These interests are generally the object of local statute regulations. The doctrine is that at common law the tenant of a close was not bound to fence against an adjoining close, unless by force of prescription; and if bound by prescription to fence his close, he was not bound to fence against any cattle but such as were rightfully in the adjoining close. If not bound at common law to fence his land, he was nevertheless bound, at his peril, to keep his cattle on his own grounds, and prevent them from escaping. The legal obligation of the tenants of adjoining lands to make and maintain partition fences, where no prescription exists, and no agreement has been made, rests entirely on positive provisions by statute; and trespass will lie against the owner of cattle entering on the grounds of another, though there be no fence to obstruct them, unless he can protect himself by statute, or prescription, or agreement. The public have no rights, even in the public highway, but a right of way or passage; and if cattle be placed in the highway for the purpose of grazing, and escape into an adjoining close, the owner of the cattle, unless he owns the soil of that part of the highway on which he placed his cattle, cannot avail himself of the insufficiency of the fences in excuse of the trespass." 3 Kent Com., 438. See also *Stafford v. Ingersol*, 3 Hill, 38. *Hilton v. Ankesson*, 27 L. T. (N. S.), 519. *Rust v. Low*, 6 Mass., 90. *Minor v. De-land*, 18 Pick., 266. *Thayer v. Arnold*, 4 Met., 589.

Our statute provides that "when two or more persons shall have lands adjoining, each of them shall make and

Burr v. Hamer.

maintain a just proportion of the division fence between them, except the owner of the adjoining lands shall choose to let his lands lie open. When any person shall have chosen to let his lands lie open, if he shall afterwards enclose the same, or if the owner of lands adjoining upon the enclosure of another, shall enclose the same upon the enclosure of another, he shall pay to the owner of the adjoining lands a just proportion of the value, at the time, of any division fence that shall have been made by such adjoining owner, or he shall immediately build his proportion of such division fence." "The value of such fence, and the proportion thereof, to be paid to such person, and the proportion of the division fence to be made and maintained by him in case of his enclosing his land, shall be determined by any two fence viewers of the precinct in the county." "If disputes arise between the owners of adjoining lands, concerning the proportion of the fence to be made or maintained by either of them, such disputes shall be settled by the fence viewers of the county; and in such case it shall be the duty of the fence viewers to distinctly mark and define the proportion of the fence to be made or maintained by each."

"When any of the above mentioned matters shall be submitted to fence viewers, each party shall choose one, and if either neglect, after eight days notice, to make such choice, the other party may select both." "The two fence viewers so chosen, shall examine the premises, and hear the allegations of the parties; in case of their disagreement, they shall select another fence viewer to act with them, and the decision of any two of them shall be final upon the parties to such disputes, and upon all parties holding under them."

"The decision of the fence viewers shall be reduced to writing, shall contain a description of the fence, and of the proportion to be maintained by each, and their decision upon any of the points in dispute between the par-

ties, submitted to them as aforesaid, and shall be forthwith filed in the office of the county clerk."

"If any person who is liable to contribute to the erection or reparation of a division fence, shall neglect or refuse, for the period of four weeks after notice in writing to do so, to make and maintain his proportion of such fence, the party injured may make or repair the same at the expense of the party so neglecting or refusing, to be recovered from him with cost of suit; and the party so neglecting or refusing, after notice in writing, shall be liable to the party injured for all damages which thereby accrue, to be determined by any two fence viewers selected as above provided, and the fence viewers shall reduce their appraisement of damage to writing and sign the same," etc. Comp. St., 47-8.

The statute makes justices of the peace fence viewers of their respective counties, and they are expected to go upon the premises where the fence in dispute has been or is to be erected, and there, in the presence of the parties or after notice to them, upon actual view, determine the matter submitted to them. The statute also authorizes them to issue subpoenas for, and examine witnesses, in order that they may make a correct determination. As the whole proceeding is statutory the mode of procedure therein provided must be followed. This requires the fence viewers, where the parties are unable to agree, to apportion to each the portion of fence to be made and maintained by him. When this is done, each party will own and have charge of a specific portion of the fence, and must keep the same in repair, and if he fail to do so the law provides a remedy. But as at common law a land owner could not be compelled to build a partition fence, a party, therefore, by the erection of such fence acquires no right of action for contribution from the owner of lands adjoining. Neither is there any allegation in the petition that would sustain an action of trespass.

The allegations of the petition are that "the plaintiff, prior to the date aforesaid, enclosed her said lands, and in so doing constructed a division fence on the line between said lots, and defendant, on or about the date aforesaid, enclosed his said lands, and in so doing connected his fences with the division fence constructed by this plaintiff," etc. There is no allegation that the defendant entered upon the plaintiff's premises or injured her property. An action for damages in a case of this kind settles nothing. Even if it could be maintained, it still leaves the question undetermined as to the ownership of any particular portion of the fence, and this leaves room for future disagreement and litigation. As a remedy to these evils and to secure to every one his rights, the law of this and a number of other states, has provided a plain, simple, adequate remedy by providing for fence viewers. And this being the mode provided by the statute it is exclusive. *Wilson v. Bumstead*, ante page 1. No complaint has yet been made as to their action and it will be time enough to consider that question when it arises.

The writer will be pardoned for saying that he prepared and introduced the bill in relation to partition fences passed by the legislature of 1859-60—the present law. The object being to cure the defect in the common law apparent in this case.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

19 488
20 510

PATRICK J. GRANT, PLAINTIFF IN ERROR, v. ALONZO D. MARSHALL, DEFENDANT IN ERROR.

Forcible entry and detention. In an action of forcible entry and detention the notice to quit, and complaint, must particularly describe the premises, for the possession of which the action is

Grant v. Marshall.

brought; but if they fail to do so, and the description given include the premises in controversy, and no objection is made to the form of either in the trial court, it will be waived.

REHEARING of case, 11 Neb., 265.

Crooker & Chapin, for plaintiff in error.

A. J. Sawyer, for defendant in error.

MAXWELL, J.

An opinion affirming the judgment of the court below, in this case, is reported in 11 Neb., 265. Afterwards, on the motion of the plaintiff's attorneys, a rehearing was granted, and the case has been very carefully and critically examined.

The action is for the forcible detention of certain premises, after the expiration of the lease, and the principal ground of objection is that neither the complaint nor the notice to quit specifically described the premises in controversy. The complaint is to recover lot 15, in block 42, in the city of Lincoln, and the notice to quit is in the same form. It is claimed on behalf of the plaintiff in error, that he was in possession of only a small portion of the premises, to-wit: a small room in the basement. No defense of that kind was interposed before the justice, nor was there any objection made to the introduction of the notice to quit on the trial. The complaint and the notice to quit must particularly describe the premises, the possession of which is sought to be recovered, as otherwise, in case of a judgment for the plaintiff, the officer with a writ of restitution would have nothing to guide him in the performance of his duty. Besides, the defendant might be charged with detention of premises not in his possession and made liable for the rent of the same, unless a particular description of the premises is given. And where objection is made on that ground, there must be a particular description in every case, to entitle the

Hickey v. The State.

plaintiff to recover. But where the complaint and notice to quit include the premises in controversy, and also include premises not in the possession of the defendant, the objection must be made in some way before the trial court, and cannot be made for the first time in this court. No action can be maintained under our statute until after the notice to quit has been given. If the notice includes the premises in controversy, but does not specifically describe them, objection must be made on that ground, otherwise it is waived. So of the other objections; they were not brought to the attention of the trial court, and therefore cannot be considered here. No judgment is sought against the plaintiff for rent, so that he loses nothing on that ground from the form of the action. It is perhaps but justice to say, that the attorneys for the plaintiff in error do not appear to have managed the case before the justice.

There is no error in the record that can be considered by this court, and the judgment is affirmed.

JUDGMENT AFFIRMED.

12 490
20 374

ALEXANDER H. HICKEY, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

Criminal Law: JURORS. One H. was convicted of manslaughter and sentenced to imprisonment in the penitentiary. On the hearing of the motion for a new trial certain affidavits were filed, tending to show that one of the jurors that tried the case was not a resident of the county. *Held*, That the failure to interrogate the juror in his examination on his *voir dire*, as to his residence, was a waiver of that objection.

ERROR to the district court for Otoe county. Tried below before POUND, J.

J. L. Mitchell and Stevenson & Murfin, for plaintiff in error.

C. J. Dilworth, Attorney General, J. C. Watson, District Attorney, and Herbert R. Wodehouse, for the State.

MAXWELL, J.

The plaintiff was convicted of manslaughter, at the December, 1881, term of the district court of Otoe county, and sentenced to imprisonment in the penitentiary for the term of six years. He now prosecutes a writ of error to this court.

The principal error relied upon is, that "one of the jurors, Samuel Morse, to whom and before whom the said cause was tried, was not a competent juror, and was not a qualified voter in said county of Otoe." It appears from the record that Morse was called as a talesman and was examined on his *voir dire*. The following is the record of his examination:

Q. 1: Did you ever hear of the cause?

A. I was out about 17 miles; I heard about the case, and never made any inquiries about it.

Q. 2: Ever form or express an opinion as to the guilt or innocence of the defendant?

A. No, sir.

Q. 3: Where do you reside?

A. About 9 miles off — — in Cass county — — in Otoe county.

Q. 4: You are a resident of this county?

A. Yes, sir.

Q. 5: (By Mitchell.) You have not formed or expressed an opinion as to the guilt or innocence of the accused?

A. No, sir.

Q. 6: (By Mitchell.) You think you could give him a fair and impartial trial?

A. Yes, sir.

A number of affidavits were filed in support of the motion for a new trial, tending to show that the juror in

Hickey v. The State.

question was not a resident of that county. The evidence upon that point is pretty evenly balanced, and there is certainly a failure on the part of the plaintiff to establish clearly the fact of non-residence of the juror in question. But suppose the proof showed conclusively that Morse was a non-resident of Otoe county, at the time of the trial, would that fact alone invalidate the verdict?

The precise question here involved was before this court in the case of *Wilcox v. Saunders*, 4 Neb., 581. In that case the defendant, after the trial, filed an affidavit setting forth that since the trial he had discovered that one of the jurors in the case had not been a resident long enough to become an elector. The court say, quoting the language used in the case of *Rockwell v. Elderkin*, 19 Wis., 368: "If the objection had been taken before the trial, by way of challenge, it would have prevailed upon strictly technical grounds, but after the trial it was too late. It is an objection that does not affect the impartiality or intelligence of the juror, and furnishes no presumption against the justice of the verdict."

In the case of *Eastman v. Wight*, 4 Ohio State, 157, after a trial, the party defeated, in support of his motion for a new trial, filed the affidavit of one Fulton, who stated that he was called by the sheriff to fill the panel of the regular jury that he was not, when the trial was had, nor was he when the affidavit was made, an elector of Ohio; that for the (then) last three years or thereabouts, he had been a resident of Indiana, until about six months before the time of making the affidavit, when he removed to Ohio; and that he was a citizen and elector of Indiana until October, 1853; (the affidavit was dated April 18, 1854.) The defendant in that case also filed an affidavit, in which he stated that he did not know that Fulton was an incompetent juror at the time of the trial, etc. The court say (page 161): "It is certainly clear that all jurors must have the qualifications of electors;

and if one not having such qualifications is retained upon the panel without the knowledge of the party or his counsel, and after reasonable diligence used to ascertain that fact, when the jury is impanelled, a new trial should for that cause be granted. But it is equally clear that the proper time to take the objection is at the impanelling of the jury; and it must be taken to have been waived, unless the party is able to show to the court, upon the hearing of the motion, that with the exercise of diligence he could not have taken the exception at the proper time. This is indispensable to prevent constant mistrials, and to protect the rights of the adverse party; otherwise the party taking the exception might lie by and take the chances of a verdict in his favor, and if given adversely be entitled to a new trial as a matter of course." Such in our view is a correct statement of the law. The person called as juror is sworn to answer questions touching his competency as a juror.

The object of the examination is to ascertain whether the person then being examined is a suitable person to sit as a juror in that case. In other words, whether he possesses the necessary qualifications, and is indifferent between the parties. A party cannot neglect to question a juror as to his qualifications and afterwards allege his own neglect as ground for relief. But the attorneys for the plaintiff claim that the rule laid down in *Wilcox v. Saunders*, although applicable to civil actions, does not apply to criminal cases. The reason of the rule certainly is the same in criminal as well as in civil cases.

In the case of *Parks v. The State*, 4 Ohio State, 280, where the accused was found guilty of murder in the first degree, the court say: "The defendant was bound to avail himself of every objection to the jurors, known at the time of impanelling the jury; and he could not be allowed to reserve an objection of this kind (the juror had expressed an opinion that the accused was guilty) to a

 Palmer v. Windrom.

juror until after verdict against him, and then make it a ground for a new trial."

In the case of *Beck v. The State*, 20 Ohio St., 228, Beck was found guilty of arson and sentenced to the penitentiary. One Hickey, who had been a member of the grand jury that found the indictment, was called as a talesman and served as a juror upon the trial, but no inquiry seems to have been made of him in regard to that matter. The court say: "The court below was justified in regarding the failure to interrogate the juror, or to make inquiry into the subject matter of this cause for challenge before the jury was sworn, as a waiver of the same." See also *Croy v. State*, 32 Ind., 384. *King v. Sutton*, 8 B. & C., 417. *State v. Quarrel*, 2 Bay, 150. *Kingan v. State*, 46 Ind., 132. *Bradford v. State*, 15 Ind., 347. We have carefully examined the case of *Hill v. The People*, 16 Mich., 351, and while we entertain great respect for that able court, we are unable to give our assent to the conclusion reached in that case. We adhere to the rule laid down in *Wilcox v. Saunders*, and it is equally as applicable in a criminal as in a civil case. When the objection is known before the juror is sworn, a failure to challenge for that cause is a waiver; and the same rule obtains where the objection could have been ascertained by proper inquiry before the juror was sworn.

There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

GROVE N. PALMER, APPELLEE, V. SAMUEL WINDROM ET AL.,
APPELLANTS.

Mortgage: MISDESCRIPTION OF PROPERTY. A mistake in the description of property mortgaged may be corrected, and a de-

12	494
48	490
13	494
50	662

Palmer v. Windrom.

eree of foreclosure entered in the same action. Certain allegations as to mistake held sufficient to sustain the judgment.

APPEAL from the district court of Saline county. Tried below before WEAVER, J.

M. B. C. True, and *F. Doezel*, for appellants, cited *McClellan v. Sanford*, 26 Wis., 595. *Glass v. Hulburt*, 102 Mass., 24. *Gillespie v. Moon*, 2 Johns. Ch., 585. *Graves v. Ins. Co.*, 2 Cranch, 419.

Hastings & McGintie, for appellee.

MAXWELL, J.

On the 20th day of July, 1880, Samuel Windrom and Nettie E. Windrom executed two notes, each for the sum of \$600.00, payable to Thomas B. Parker, or order, and due in one year, with interest at 8 per cent. To secure the payment of these notes the Windroms executed a mortgage upon lots 1414, 1415, 1416, 809 and 810, in the town of Dorchester, in Saline county. On the 24th day of August, 1881, a petition was filed by Grove N. Palmer in the district court of Saline county to foreclose the mortgage. It is alleged in the petition that the plaintiff purchased said notes and mortgage before they became due; that the entire amount of said notes, except the sum of \$100.00, is due and unpaid. It is also alleged that there is an error or "mistake of all parties thereto in the description of the property sought and intended to be conveyed thereby, and at the time of making and acknowledgment of said mortgage deed, it was supposed, agreed, and understood by all the parties to the said mortgage deed that the premises thereby conveyed were the premises really known and described upon the recorded plat of said town of Dorchester, as lots numbered respectively 1205, 1206, and 1207," etc. It is also alleged that Adam N. Schuster, and others who are made defendants, "claim some interest in and to said premises by virtue of a writ of attach-

ment levied thereon in a certain action against said Samuel Windrom and Thomas B. Parker, now pending in this court, but the interest and lien of said defendants, if any they have, are subsequent and subject to that of the plaintiffs," etc.

To this petition, Schuster and the other plaintiffs in the suit in attachment, filed an answer, in which they allege "that on the 18th day of June, 1881, they began an action against said defendants, Samuel Windrom and Thomas B. Parker, to recover the sum of \$420.35, and that an order of attachment issued in said action and was levied upon the lots described in the plaintiff's petition, and that said attachment is still in full force and undissolved," etc. There is also a denial of a mistake in the plaintiff's mortgage, and a claim that the lots in dispute should be subjected to the payment of the judgment in the attachment.

On the hearing the court found "from the petition and evidence herein, that there has been an error inadvertently made in the mortgage deed as described in the plaintiff's petition, and thereupon, there appearing no good reason why an order correcting said error should not be made, the same is hereby allowed and the said mortgage is hereby corrected to read as follows, viz: lots numbered 1205, 1206, 1207," etc.

None of the testimony is preserved in the record, and the only question before the court is, did the district court have authority, under the allegations in the petition and answer, to correct the mortgage? We think it had. Where there is an agreement to convey by certain boundaries, but the conveyance does not cover the entire premises, or conveys land not intended to be conveyed, it will be reformed according to the actual agreement, even in favor of an assignee. *Bently v. Smith*, 2 Keyes, 343. *Moaks Note to Clark's Ch.*, 42. And the same rule applies to mortgages.

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The appellants object to the petition because it fails to set forth what interest of the appellants is sought to be subjected, and the time when the appellants acquired their interest. The petition is very far from being free from objection, as it lacks clearness and directness in its statements, both as to the mistake and the interest of the appellants, but there is sufficient stated therein under the liberal rules of pleading established by the code to sustain a judgment. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

KEITH BROTHERS, PLAINTIFFS IN ERROR, v. CHRISTOPHER B. HEFFELFINGER, DEFENDANT IN ERROR.

12 497
30 649

1. **Sale: BONA FIDE PURCHASE.** One H., through an agent, purchased a stock of goods from A. for their full value, in satisfaction of a debt owing from A. to H., and the payment of certain other debts, which H. assumed, there being still other debts of which H. had notice. In a contest with a subsequent attaching creditor, *held*, that a verdict that H. was a *bona fide* purchaser would not be disturbed.
2. **Practice: SERVICE OF PROCESS BY CORONER.** A coroner may lawfully serve a writ of replevin, where the sheriff is a party to the action.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

Batty & Ragan, for plaintiffs in error.

R. H. Mills and James Laird, for defendant in error.

MAXWELL, J.

It appears from the record, that on the 13th. day of January, 1881, one A. C. Wier, traveling agent for the North Star Boot and Shoe Manufacturing Company of

Keith Brothers v. Heffelfinger.

Minneapolis, purchased the goods in question from A. Andrus, of Hastings, for his principal, for the sum of \$3,100.00. Of this sum about \$2,600.00 or \$2,700.00 was a debt due the Boot and Shoe Co; about \$300.00 a debt owing by Andrus at a bank; and an account due one McKnight. Andrus at this time was owing about \$2,000.00, beside the above named debts, of which Wier at the time of the purchase had notice. Wier took possession of the goods in the name of his principal on the 14th of January, 1881. On the 17th of that month Keith Brothers commenced an action by attachment against Andrus, and caused the goods in controversy to be attached. On the same day the defendant herein commenced an action in replevin, and took the goods from the possession of the sheriff. The plaintiffs were substituted in the action for the sheriff. The Boot and Shoe Co. seems to consist of the defendant. On the trial of the cause in the court below judgment was rendered in favor of the defendant herein. The plaintiffs bring the cause into this court by petition in error. The errors assigned are, in substance, that the verdict is against the weight of evidence, and that the coroner had no authority to serve the writ of replevin.

I. As to the first objection, it is sufficient to say that the testimony shows conclusively that Wier purchased the goods for the defendant and paid their full value. Fraud as to the other creditors is pleaded in the answer, but there is no proof whatever to sustain it; nor is there any proof, except by inference, to show that the plaintiffs were creditors of Andrus; nor what amount was claimed under the attachment. The testimony clearly establishes the right of the defendant in error as against the plaintiffs to the goods in question, and there is no error in that regard.

II. Section 3 of Chap. VIII. of the Revised Statutes of 1866, which was in force when this action was commenced,

provided that: "Every coroner shall serve and execute process of every kind, and perform all other duties of the sheriff, when the sheriff shall be a party to the case, or whenever affidavit shall be made and filed as provided in the succeeding section, and in all such cases he shall exercise the same powers, and proceed in the same manner, as prescribed for the sheriff in the performance of similar duties." The coroner may lawfully serve a writ of replevin whenever the sheriff is a party to the action.

There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

12	499
36	619
12	499
44	304

THOMAS H. HARRISON, PLAINTIFF IN ERROR, v. THE UNION NATIONAL BANK OF LEWISBURG, PENNSYLVANIA, DEFENDANT IN ERROR.

Limitation of Actions. In May, 1872, one H., a resident of Wisconsin, made his promissory note due in six months and payable in that state, and thereafter continued to reside there until October, 1875, when he removed to this state. An action was commenced on the note in this state in January, 1878, to which the statute of limitations was pleaded as a defense. *Held*, 1st: That the statute of this state did not commence to run until H. had come into the state. 2nd: That as the statute of Wisconsin had not barred the claim before H. removed from that state, the court could not add the time of his residence there, after the note became due, to the time of his residence in this state, before the commencement of the action, to create the bar of the statute.

ERROR to the district court for Gage county. Tried below before WEAVER, J.

Colby & Hazlett, and Charles O. Bates, for plaintiff in error.

The note being barred on its face, burden of proof is upon the plaintiff to show the specific exceptions, which he alleges in his petition, in order to take the case out of the statute. *Funk v. McVay*, 21 La. Ann., 192, 267, 273, 276, and 501. *Prigman v. East Tenn. R. R. Co.*, 1 Lea, (Tenn.), 204. *Spurger v. Hardy*, 4 Mo. App., 573

The plaintiff simply proved that the defendant resided in Wisconsin when the cause of action accrued, and did not commence to reside in Nebraska until 1875. This is not sufficient to take the case out of the statute. Angell on Limitations, section 208. *Hoggett v. Emerson*, 8 Kan., 262. *Faw v. Roberdeau*, 3 Cranch., 174. *Palmer v. Shaw*, 16 Cal., 95. Plaintiff should have proven, not only that the defendant was out of the state at the time the cause of action accrued, but also that he did not come into the state so that service of process could have been had upon him, and the debtor thereby enabled to reduce his claim to a personal judgment, until within five years prior to the commencement of the action. A construction of this exception of the statute can only be such an absence from the state as entirely suspends the power of the plaintiff to commence his action. 7 Waits' Actions and Defenses, 273. *Blodgett v. Utley*, 4 Neb., 29. *Sage v. Hawley*, 16 Conn., 105. *Randall v. Wilkins*, 4 Denio, 579.

J. H. Broady and *A. Hardy*, for defendant in error, cited *Blodgett v. Utley*, 4 Neb., 25. *Seymour v. Street*, 5 Neb., 85. *Edgerton v. Wachter*, 9 Neb., 500.

MAXWELL, J.

This is an action upon a promissory note, of which the following is a copy :

" \$759.81. JANESVILLE, WIS., May 8th, 1872.

Six months after date, I promise to pay to the order of James S. Marsh & Co., at the First National Bank of

Janesville, Wis., seven hundred and fifty-nine dollars and eighty-one cents, value received, with interest at the rate of ten per cent. from date, until paid.

T. H. HARRISON."

After the note became due, it was transferred to the defendant in error, who brought an action thereon against the maker in the district court of Gage county, in January, 1878. The defense is the statute of limitations.

Sec. 20, of the code of civil procedure, provides that: "If, when a cause of action accrues against a person he be out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he come into the state, or while he is absconded or concealed; and if after the cause of action accrues, he depart from the state, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."

The testimony shows that Harrison, at the time of making the note in question, was a resident of the state of Wisconsin; and that he continued to reside there until October, 1875, when he removed to this state. There is no allegation in the answer, nor any testimony tending to show, that the statute of Wisconsin had run against the claim at the time Mr. Harrison left that state. That being the case, the question is to be determined by our statute, which gives five years in which to bring an action upon a promissory note.

We know of no rule that would permit us to add the time during which the maker of the note continued to reside in Wisconsin after it became due, to the time that he has resided in this state, and thereby create the bar of the statute. Unless his residence in that state was continued for a sufficient length of time to constitute a bar, it is no defense in an action brought on the instrument in this state. And in an action on a promissory note the

statute only commences to run from the time that an action could be commenced thereon, and service had on the defendant.

The statute of limitations is therefore no defense in this case, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

JOHN E. SMITH, ASSIGNEE OF H. P. WEBB & Co., PLAINTIFF
IN ERROR, v. JOHN L. HOBLEMAN, ET AL., DEFENDANTS IN
ERROR.

Promissory Note: PAYMENT IN WHEAT. Where, in an action upon a promissory note, the answer admitted the execution of the note, but alleged that it was to be paid in wheat, which had been delivered in pursuance of the contract, it was not error for the court to instruct the jury if they found such contract to exist, "and that defendants did deliver the wheat to pay said note in full, you will find for the defendants."

ERROR to the district court for Gage county. Tried below before WEAVER, J.

Pemberton & Forbes, for plaintiff in error.

Answer states that agreement to pay in wheat was made *after* execution of the note, and not at the time, as assumed by court. The defendant can only defend on grounds set up in his answer. *VanDyke v. Davis*, 2 Mich., 145, and cases cited.

Hale & Bibb, for defendants in error, cited Stephen on Pleading, 292.

MAXWELL, J.

This is an action upon a promissory note given by Hobleman and Schlake to H. P. Webb & Co. The action is brought by Smith, the assignee. The defendants ad-

mit the execution of the note, but say "that said defendants agreed that they would deliver wheat at the flouringmill of Holt & Webb, in Dewitt, in Saline county, Neb., at an agreed price per bushel, a quantity of wheat sufficient to pay said note, and said defendants say that they did, according to said agreement, deliver to said plaintiff the said wheat in payment of the money mentioned in said promissory note, and that the said plaintiff did then accept and receive the same in full satisfaction of the said sum of moneys so due and owing from the said defendants to the said plaintiff." The reply is a general denial.

The testimony shows that the note was given for money borrowed by the defendants from the bank of H. P. Webb & Co.; that Webb, at that time, was also a member of the firm of Holt & Webb, engaged in the milling business at Dewitt, in Saline county. Hobleman and Schlake both testify that the note was to be paid in wheat, and that wheat was delivered to Holt & Webb in pursuance of the contract. Mr. Webb, in his testimony, admits the delivery of the wheat, but says the wheat was merely stored in the mill, and Hobleman was to sell the same when the price suited him, and out of the proceeds to pay the note. Hobleman seems to have delivered about eight hundred bushels of wheat at the mill, and the mill seems to have burned in a day or two after the delivery of the wheat.

On the trial of the cause, the court instructed the jury that: "If you find from the evidence that defendants, at the time they made their note, agreed to pay the same in wheat, and if you find that defendants did deliver the wheat to pay said note in full, you will find for the defendants." Various objections are made to this instruction which it is unnecessary to consider, as the instruction was proper under the issue made by the pleadings.

An instruction was asked on behalf of the plaintiff as

to the authority of Webb to receive wheat in payment, which was properly refused, there being nothing in either the pleadings or evidence to justify it.

There is no error in the record and the judgment must be affirmed.

JUDGMENT AFFIRMED.

12	504
36	484
12	504
32	308

NEW ENGLAND MORTGAGE SECURITY CO., APPELLANT, v.
JOHN P. AUGHE, ET AL, APPELLEES.

1. **Usury.** A plea of usury, and of payment of interest upon an usurious contract, as payment *pro tanto* upon the principal, are available as a defense in an action on the usurious contract; but when the action is dismissed without prejudice before being submitted to the court, such defense is not such a set off or counter claim as can be retained and tried by the court.
2. **Dismissal of Action: REMOVAL TO U. S. COURT.** Where a plaintiff dismissed his action and afterwards filed a petition to remove the same to the U. S. Circuit court, it is not error for the court to overrule the motion, there being nothing to remove.

APPEAL from Saunders county. Tried below before POST, J.

G. L. Loomis and Hull & Stearns, for appellant.

No appearance for appellees.

MAXWELL, J.

This is an action to foreclose a mortgage upon real estate, brought in the district court of Saunders county, in September, 1879. The defendants, John P. and Cecelia D. Aughe, filed an answer to the petition setting up the plea of usury and the payment of \$100.00 as interest. The defendant, Parmele, filed an answer disclaiming any interest in the land. On the 16th of Sept., 1880, the attorneys for the plaintiff directed the clerk to

enter a dismissal of the action without prejudice, upon payment of costs. A journal entry of November 23, 1880, shows that the cause "was, by agreement, continued." In April, 1881, the cause was again continued. In October, 1881, the cause came on for hearing upon the set-off and cause of action set up in the answer of John P. Aughe, whereupon the attorney for the plaintiff filed the necessary papers to remove said cause to the circuit court of the United States. The court denied the application upon the ground that the plaintiff had dismissed the action. The court then found the amount the plaintiff was to loan the defendant was the sum of \$500.00, and a note and mortgage for that sum were taken, but that the amount of money actually paid to the defendant was the sum of \$398.24. The court also found that the defendant had paid the plaintiff the sum of \$100.00 interest, and thereupon rendered judgment in favor of the defendant for the sum of \$201.76 and costs. The plaintiff appeals to this court.

The question to be determined is, is money, retained or paid as usury, an independent cause of action that may be severed from the usurious contract, and a recovery had thereon?

Section 5, of the act regulating interest (Comp. St. 323), provides that: "If a greater rate of interest than is hereinbefore allowed shall be contracted for or received, or reserved, the contract shall not therefore be void; but if in any action on such contract, proof be made that illegal interest has been directly or indirectly contracted for, or taken, or reserved, the plaintiff shall only recover the principal, without interest, and the defendants shall recover costs; and if interest shall have been paid thereon, judgment shall be for the principal, deducting interest paid," etc.

A party liable upon a usurious contract may avail himself of the remedy provided by the statute, if he so elect. To do so he must interpose the facts showing

 Lamb v. Gregory.

usury as a defense to the action. When usury is established the plaintiff can only recover judgment for the principal, deducting interest paid. If usury has been paid, and the entire amount of the principal, no action will lie to recover it back. It is not, therefore, an independent cause of action that can be retained after the dismissal of the principal case. It is properly a defense to be set up in an action on the contract. Although no action will lie to recover back usurious interest when the entire transaction is closed up, yet, so long as any portion of the principal remains out of, or in connection with which the usurious interest accrued, it may be deducted from, or set off against such principal. *Payne v. Newcomb*, 16 West. Jurist, 89. *Hawthorn v. Snyjaker*, 88, 111, 197. *Mitchell v. Lyman*, 77 Ill., 225. *Peddicord v. Conrad*, 85 Ill, 102. *Jenkins v. Greenbaum*, 93 Ill., 2. *House v. Davis*, 60 Ill., 367. *Hadden v. Innis*, 24 Ill., 381. *Farwell v. Myers*, 35 Ill., 41. *Saylor v. Daniels*, 37 Ill., 331. *Jenkins v. International Bank*, 95 Ill., 568. The defense of usury is still available to the defendants when an action is brought on the note and mortgage.

The court did not err in overruling the motion to remove the cause to the U. S. Circuit court, there being no case in court to remove.

The judgment of the district court is reversed.

12	506
48	712

WALTER J. LAMB, TRUSTEE, PLAINTIFF IN ERROR, v. JOHN S. GREGORY, DEFENDANT IN ERROR.

Judgment: RELEASE. The voluntary release of one joint judgment debtor operates as a release of his co-defendant.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Lamb, Billingsley & Lambertson, for plaintiff in error.

John S. Gregory, pro se.

MAXWELL, J.

On the 29th of October, 1879, the plaintiff filed a motion in the district court of Lancaster county, to obtain a deficiency judgment against John S. Gregory and J. H. McMurtry, for the sum of \$386.70. Two days thereafter the motion was sustained and judgment rendered as prayed, and execution awarded. At the same term of the court at which the judgment was rendered, McMurtry filed a motion therein, asking to have the judgment set aside as to him, upon the ground of a discharge in bankruptcy. To this motion the following, signed by the plaintiff's attorneys, was appended: "We hereby consent to the setting aside of the judgment against said J. H. McMurtry." The judgment against McMurtry was thereupon set aside. Gregory then filed a motion asking the court to discharge him from liability upon the judgment, because the plaintiff had voluntarily released McMurtry. The hearing on this motion was continued from time to time until the 8th day of November, 1880, when the motion was sustained. The cause is brought into this court by petition in error.

There is no bill of exceptions, and none of the testimony used on the hearing on the motion is before us. The court undoubtedly had authority to modify its own judgment at the term at which it was rendered. This it did by discharging McMurtry with the consent of the plaintiff's attorneys. No question is raised as to the authority of the attorneys to sign such release, and that question is not before the court. The defendant contends that a release of McMurtry operates as a release of both defendants from liability on the judgment. There is nothing in the record, except the motion of McMurtry tending to show that he was released upon the ground of

his discharge in bankruptcy, and the court below seems to have found against such discharge, and that the release was voluntary. The question presented to this court therefore is, what is the effect of a voluntary release of a joint debtor?

Parsons says: "If two or more are jointly bound, or jointly and severally bound, and the obligee releases one of them, all are discharged." 1 Parsons on Contr., 27, and cases cited in note *b*.

In Broom's Legal Maxims, * 675, it is said: "On the other hand, the debtee's discharge of one joint, or joint and several debtor, is a discharge of all; and a release of the principal debtor will discharge the sureties, unless, indeed, there be an express reservation of remedies against them."

That the voluntary release of one joint debtor has the effect to release all, will not seriously be questioned. This is decisive of the case. The plaintiff having voluntarily released McMurtry, the court below did not err in discharging his co-defendant. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

12 508
14 246
21 387
21 368

DANIEL E. BATEMAN, PLAINTIFF IN ERROR, v. JAMES M. ROBINSON, DEFENDANT IN ERROR.

1. Contract: CONSIDERATION. B. having a pre-emption claim upon the public lands, made an arrangement with R., to enter the same with soldiers' additional eighties and convey to him. R. being paid \$300.00. Held, That upon a failure to convey, B. could maintain an action against R. to recover the consideration.
2. ———: ———. Where acts are merely prohibited by statute, and the parties are not *in pari delicto*, the party upon whom no penalty is imposed may upon non-performance maintain an

Bateman v. Robinson.

action against his co-contractor, to recover the amount advanced on the contract.

ERROR to the district court for Lancaster county. Heard below before WEAVER, J., of the first district.

Mason & Whedon, and *Harwood & Ames*, for plaintiff in error.

Lamb, Billingsley & Lambertson, for defendant in error.

MAXWELL, J.

This action was brought in the district court of Lancaster county, to recover the sum of \$800.00 with interest. A demurrer to the petition was sustained and the action dismissed. The plaintiff brings the cause into this court by petition in error. The following is a copy of the petition:

"The said Daniel Bateman complains of the said James M. Robinson, defendant, and for cause of action against said defendant shows:

First, That heretofore, viz: on the 29d day of May, A. D. 1876, the said plaintiff and defendant made and entered into a certain contract, and reduced the same to writing in the words and figures following, to-wit:

STATE OF NEBRASKA, }
LANCASTER COUNTY. } ss. Be it known, that on this day and between J. M. Robinson, party of the first part, and D. E. Bateman, party of the second part, made and entered the following agreement: J. M. Robinson, for and in consideration of the sum of three hundred dollars cash, agrees to and with the party of the second part, to enter or cause to be entered by soldiers add'l eighty entries, and give warrantee deed and United States final registers certificate for (160) one hundred and sixty acres, now held by preemption by the said Bateman, viz: The s. w. one-fourth of section 4, town. 18, range 9, west, in said Rice

county, Kansas, and the said party of the second part avers, that he holds a preemption claim on said tract of land that is valid, which he hereby agrees to hold intact upon the records of said land office, and is to pay to the said party of the first part, the sum of \$300.

J. M. ROBINSON,
D. E. BATEMAN.

Plaintiff says that on the 23rd day of May, A. D. 1876, he paid the said defendant the said sum of three hundred dollars.

Plaintiff avers, that he the said plaintiff has in all things kept and performed his part of said agreement, but that the said defendant has failed, neglected and refused to perform his part of said agreement in every particular whatsoever, and doth still fail and refuse to perform his part of said agreement, and that the said defendant intending and contriving to cheat, swindle, wrong and defraud this plaintiff, has refused, and doth still refuse, to keep and perform his part of said agreement, made and entered into as aforesaid and every portion thereof. Wherefore, plaintiff prays judgment, against said defendant for the said sum of three hundred dollars with interest thereon, from the said 23rd day of May, A. D. 1876, and costs.

This is not an action to enforce specific performance of the contract to convey, but to recover money paid thereon. The defendant received this money as the consideration for the land, but is now unable, or refuses to perform the contract. Can he be allowed to retain the money thus received? We think not. The case is similar to that of *Simmons v. Yurann*, 11 Neb., 516. In that case Simmons contracted to convey a portion of his homestead or pre-emption, when he acquired title thereto, in consideration of forty acres of breaking and \$140.00 in cash. The breaking was done as agreed upon, but when asked to pay therefor his answer was the same as in this case.

The court held that he was liable for the price of the breaking.

The rule is well established that a *particeps criminis* cannot invoke the aid of a court; but this rule does not apply to all cases. If the party seeking relief, although *particeps criminis*, yet is not *in pari delicto*, the rule does not apply.

This distinction seems to have been taken for the first time in the case of *Smith v. Bromley*, 2 Doug., 696, and was there applied to cases where the law was intended to protect one of the parties from particular acts of oppression, such as usury, but the rule has since been applied generally.

In *Jaques v. Golightly*, 2 Wm. Blacks., 1073, the action was brought to recover money paid by the plaintiff to the defendant as a premium for insuring lottery tickets, the transaction being prohibited by statute. It was claimed that the plaintiff being *particeps criminis* could not recover. But it was held that the action could be maintained. Blackstone, J., said it was not like the stock jobbing act, "because there both parties are made criminals and subject to penalties."

In *Browning v. Morris*, 2 Cowp., 790, Lord Mansfield draws the distinction between acts which are *mala in se*, such as bribery, and such as are prohibited by statute. He says: "For instance, in bribery, if a man pays a sum of money by way of a bribe, he can never recover it in an action, because both plaintiff and defendant are equally criminal. But where contracts or transactions are prohibited by positive statute for the sake of protecting one set of men from another set of men; the one from their situation and condition, being liable to be oppressed or imposed upon by the other; there the parties are not *in pari delicto*; and in furtherance of these statutes, the person injured after the transaction is finished and completed may bring his action and defeat the contract.

Bateman v. Robinson.

* * * And it is very material that the statute itself, by the distinction it makes, has marked the criminal; for the penalties are all on one side. * * * The man who makes the contract is liable to no penalty."

The same question arose in *Williams v. Hedley*, 8 East, 378, and the cases above cited are referred to by Lord Ellenborough, and the doctrine approved.

In the case of *Inhabitants of Worcester v. Eaton*, 11 Mass., 368, Parker, C. J., after referring to the principle laid down in the cases of *Smith v. Bromley*, and *Browning v. Morris*, says: "This distinction seems to have been afterwards observed in the English courts, and being founded in sound principle is worthy of adoption as a principle of common law in this country."

In the case of *White v. Franklin Bank*, 22 Pick., 181, the action was brought to recover money which the plaintiff had deposited with the defendant under an agreement that it should remain for a specific time, in violation of a statute which prohibited the bank from making a contract "for the payment of money at a future day certain." It was held that the action would lie, and the doctrine of the English cases above cited was fully approved.

In the case of *Lowell v. Boston & Lowell R. R. Co.*, 23 Pick., 24, the question again arose. The court say (page 32): "The general rule of law is, that where the parties participate in the commission of a criminal act, and one party suffers damages thereby, he is not entitled to indemnity or contribution from the other party. Our law, however, does not in every case disallow an action by one wrongdoer against another, to recover damages incurred in consequence of their joint offense. The rule is, *in pari delicto potior est conditio defendentis*. If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offense. In respect to

Rush v. Valentine.

offenses in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not enquire into their relative guilt. But where the offense is merely *malum prohibitum* and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers." See also *Atlas Bank v. Nahant Bank*, 3 Met., 581.

In the case of *Schermerhorn v. Talman*, 14 N. Y., 98, there is an elaborate review of authorities, and the doctrine of the English and Massachusetts cases cited is fully approved. The rule laid down in the cases above cited is based upon reason and sound principle, and is fully approved by us, and it is decisive of the case. Even if the contract was prohibited by statute, which we do not decide, still the parties were not *in pari delicto*, as there is no penalty imposed on a party for selling his interest in land upon which he has a pre-emption claim. The contract amounts to this, Bateman having a pre-emption claim upon the public lands, which probably he was unable to enter from some cause that does not appear in the record, made an agreement with Robinson to enter the land and convey to him. Robinson received the consideration for the contract, but refuses to perform the same. Can he retain the consideration? We think not. There are no facts stated in the petition that will defeat a recovery in such case. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JOHN RUSH, APPELLEE, v. D. A. VALENTINE, APPELLANT.

Public Lands: DECISIONS OF LAND OFFICERS. Questions relating to settlement on the public lands under the pre-emption act of 1841, are questions of fact, and the findings of the land officers

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as to such facts when affirmed on appeal, are conclusive on the parties, and cannot be reviewed in a collateral proceeding.

APPEAL from the district court of Douglas county.
Tried below before SAVAGE, J.

C. A. Baldwin, for appellant.

John D. Howe, for appellee.

MAXWELL, J.

The prayer of the petition in this case is in substance for a decree, declaring that the defendant holds the north east quarter of section 18, in township 15 north, of range 11 east, in Douglas county, in trust for the plaintiff, and require him to convey the same to the plaintiff. A decree was rendered in the court below in favor of the plaintiff. The defendant appeals to this court.

It is alleged in the petition that the plaintiff, "on or about the 3rd day of October, 1869, entered upon and began to improve" the lands above described. It is also alleged, in substance, that he possessed the necessary qualifications to enable him to preempt the same; that on the 19th day of November, 1869, he applied to the receiver of the U. S. land office at West Point—the register being absent at Omaha, but the receiver discharging the duties of said register to file the usual declaratory statement of his intention to enter said lands by pre-emption, and tendered the same to said receiver and register, who declined to receive or file the same, upon the sole ground that said lands were school lands and therefore not subject to entry; that the books, records, and plats of said office showed and described said lands to be school lands, and had so described them for many years before; but, in truth and in fact, said lands were not school lands, but were, on the said 15th day of November, and for some time before had been, subject to entry under the pre-emption laws of the United States; that said register knew said facts and

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kept said records without correction with a view to cover up said lands and retain them for his own use and benefit, * * * * * that on the 3rd day of October, 1869, this plaintiff went upon said lands, supposing them to be school lands, and commenced to build a house thereon for a residence for himself and family, and continued at work upon said house down to about the 15th of November following, when his family moved into said house, which they have ever since continued to occupy; that he commenced said improvements and settlement with a view to buying or leasing said lands, believing them to belong to the school fund under the laws of the state of Nebraska, when they should be offered for sale or leasing; but that on or about said 15th day of November he became aware of the fact that said lands were government lands and subject to private entry under the pre-emption laws of the United States, and moved upon said lands at that time, and then made a settlement thereon with a view of entering and pre-empting the same under said laws of the United States."

It is also alleged that the value of the house erected by the plaintiff was about \$500.00, and "that on or about the 17th day of November, 1869, the register of said land office, E. K. Valentine, who is a brother of said defendant, Valentine, conspiring with his brother to defraud this plaintiff, both of them well knowing that the United States had kept, recorded, registered and advertised said lands as school lands, and that said Rush had made valuable improvements upon said lands, and intended to purchase them as aforesaid, left his said office in West Point, some 65 miles distant, with his said brother, and proceeded to said lands with him, and on the evening of said day aided his brother in making a pretended settlement upon said lands, also at that time and before any settlement was actually made upon said lands by said defendant, Valentine, made out upon a blank of said office

which he took with him for that purpose, the statement of his said brother * * * declaring his intention * * * to file and purchase said lands under the pre-emption law * * * which (statement) said register retained in his possession, and after the 19th day of November, 1869,—the exact date being unknown to the plaintiff—caused it to be placed among the records and filings of said land office."

It is also alleged, in substance, that on the 12th day of January, 1870, the plaintiff was allowed to file on said land as of November 19th, 1869, and that the defendant built a small cabin upon said land, and plowed a small portion thereof and lived thereon at times, but not continuously and without his family, until the 15th day of May, 1870, when "in a contest had in said land office between said Rush and said D. A. Valentine before said land officers touching the right to preempt and enter said lands, and upon the allegations and facts in this petition alleged, said register and receiver decided the right to pre-empt and enter said lands to be in said Valentine; and upon appeal by plaintiff from said decision to the commissioner of the general land office at Washington, said decision was affirmed, and upon a further appeal from said last named decision to the secretary of the interior by said Rush, said last named decision was also affirmed, and said filing of said Rush cancelled; but that the defendant has not lived upon said land, and that he entered the same to speculate upon, and, in fact, for the use and benefit of the register of said land office, and that the moneys to pay for said lands were derived from said register.

It is also alleged, in substance, that on the first day of June, 1872, the defendant was allowed to enter said land and thereafter received from the United States a patent therefor, and "that the sole ground of said decision was that the plaintiff had not filed his declaratory statement

in thirty days after the date of his settlement upon said lands with a view to pre-empt the same."

It is also alleged that the plaintiff made the necessary proof to entitle him to pre-empt, and made application to enter said lands, and was then ready and willing to pay the government for the same. There are also charges of fraud and collusion, but as no additional facts are stated it is unnecessary to notice them.

The answer of the defendant states: "that he is a brother of E. K. Valentine, who then was the register of the United States land office for the district in which said land was situated, and that it is true that said land was marked on the books of said office at one time as school lands, but defendant says that said lands were so marked on said books as school lands long before said E. K. Valentine had anything whatever to do with said office and books; that said E. K. Valentine nor this defendant had ought to do with so marking said books, and defendant says he has no knowledge whatever as to the fact how they became so designated, but says that it is not true, and he denies that said E. K. Valentine kept, or permitted said books to remain, in the condition in which he found them when they came to his possession as such register for an improper purpose or object, whatever." The facts upon which the plaintiff predicates his right to recover are all denied, and the defendant says, in substance, that he entered said land in good faith, for his own use, and that he made no contract to convey the same.

In 1859 congress passed an act providing that: "Where settlements, with a view to pre-emption, have been made before the survey of the lands in the field, which are found to have been made on sections sixteen and thirty-six, these sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, shall be reserved or pledged for the use of schools or colleges in the state or territory in which the lands lie,

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other lands of like quality are hereby appropriated in lieu of such as may be patented by pre-emptions; and other lands are also hereby appropriated to compensate deficiencies for school purposes," etc. 11 Statutes at Large, 385.

In January, 1860, the legislature of this then territory passed an act providing "that the territorial commissioner of common schools be and is hereby authorized and empowered to select lands in lieu of sections 16 and 36, or any part of said sections, which may have been sold by the general government. That all necessary expenses incurred by said territorial commissioner in the selection of said land shall be paid by the territorial treasurer, on the warrant of the auditor." Laws of 1859-60, page 98.

Whether the land in controversy had been selected, or an attempt had been made to select the same under the provisions of this act, does not appear in the record. The only testimony upon that point being that of E. K. Valentine, who testifies that he "told his brother that he thought it (the land in controversy) was a very nice piece of land to be lying vacant. There was other land in Douglas and some in Sarpy in that same way." He also testifies "it was in the latter part of June or fore part of July, 1869, I got a letter informing me of the fact" (that the land was subject to pre-emption) * * * "we didn't open at West Point until the 1st of June of that year. It was about a month after that I had my attention called to the indemnity school land, whereupon there was correspondence between myself and the commissioner relative to that matter." He also testifies as to the plat of the land that there was a letter "S" in pencil inside of a circle. "I don't know by whom it was put there. It was there when I went into the office. I had special instructions with regard to that class of land from my predecessor, Mr. Sweezy."

Question. State whether or not you had anything to do whatever with putting on that letter "S"?

A. No, sir.

Whether this land had been withdrawn from market, or if so, when it was restored, does not appear. There being no proof upon these points, the inference is, that the land had not been withdrawn, but had remained open to settlement and entry under the pre-emption laws of the United States.

But it is said that Valentine should have erased the letter "S" upon the plat of the land in dispute, and other lands claimed as indemnity lands, as soon as he became aware that they were open to pre-emption. The answer to this objection is, that there is nothing in the record to show that he was directed to make such erasure, or that it was his duty to make the same. It should appear in some way that he was guilty of neglect, or wilfully concealed the true character of the land for purposes of gain, to defraud the plaintiff to be available in this action. So far as this record discloses, the alleged illegality of the selection of the school land at that time was a matter of mere conjecture, not resting upon any adjudication.

Section 15 of the pre-emption law of 1841 provides that: "When any person settles or improves a tract of land subject at the time of settlement to private entry, and intends to purchase the same under the preceding provisions of this chapter, he shall, within thirty days after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon and declaring his intention to claim the same under the pre-emption laws," etc.

The abstract of declaratory statements given in evidence by the plaintiff shows the following facts: that the plaintiff filed his declaratory statement January 12, 1870, to take effect as if filed Nov. 19, 1869, in which the date

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of his settlement on the land in dispute is stated to be October 3rd, 1869. An abstract of the defendant's declaratory statement is also in evidence, from which it appears that his settlement was made Nov. 17th, 1869, and filed the next day. Whether it was actually filed the next day or not, there is some doubt, but there is no doubt it was filed before the expiration of thirty days, while there was no attempt on the part of the plaintiff to file his declaratory statement before the 19th day of November, 1869.

The mere fact of *settlement alone* will not give the right of pre-emption. To be available, a declaratory statement must be filed in the local land office within thirty days where the lands have been offered, as it is conceded this land had been. If this declaratory statement is not filed within the proper time, the rights of the party to that tract of land cease, at least under that settlement. And ignorance of the law relating to the case will not aid the applicant. If we place the most favorable construction possible upon the testimony of the plaintiff as to his settlement under the pre-emption law, still the settlement of the defendant is prior in point of time to his, and other things being equal, priority of settlement confers the better right. But questions relating to settlement are purely questions of fact, and the law has created a tribunal for the determination of such questions, whose decisions are final, unless reversed by a direct proceeding or otherwise. The questions here involved have already been decided by the Department of the Interior. The record shows the following adjudication in the case.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., January 9th, 1872. }

Register and Receiver, West Point, Nebraska:

Gentlemen: The case of *D. A. Valentine v. John Rush*, pre-emption claimants, to the n. e. one-fourth 18, 15, 11 e., in your district, and trial of which was had in your office

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May 25th, 1870, has been duly considered. From the evidence submitted it appears that Mr. John Rush commenced a settlement on said tract October 3rd, 1869. That he commenced the erection of his house on the 6th, completed it November 17th, and moved his family into it on the 19th, and the same day, Nov. 19th, he made application at the land office to file on said tract. Mr. Valentine commenced his settlement Nov. 17th, 1869, made his filing No. 2491, on the 18th and subsequently made satisfactory cultivation and improvements. This land having once been, "offered" it was incumbent on Mr. Rush to file his declaratory statement therefor within 90 days next after the date of his settlement, and on his failure so to do it became subject to the entry of any other settler. He not having offered to file his declaratory statement within said legal period, the land was open to Mr. Valentine's entry, or that of any other qualified person. Your decision awarding the right of entry to Valentine is therefore for this reason approved, and you will allow him to make his entry on proof of continued improvement, etc. You will give due notice hereof to all parties in interest, allow 60 days for an appeal, and thereafter promptly inform this officer of the condition of the case, referring to this letter "C" by date.

WILLIS DRUMMOND, *Commissioner*.

We think the testimony fully sustained the finding of the commissioner, as the plaintiff's testimony is not satisfactory as to the date of his settlement. But in any event, this decision upon these questions is conclusive and cannot be reviewed in this collateral proceeding. *Smiley v. Sampson*, 1 Neb., 56. The petition fails to state facts sufficient to entitle the plaintiff to relief, upon the ground of fraud. And the proof fails to show that E. K. Valentine has any interest in this land whatever — the testimony being that he has not. The only inference of fraud consists in the fact that the defendant is his brother, and

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that he aided him in procuring the money to enter the land, and has paid a portion of the interest on the same. But this is not sufficient to entitle the plaintiff to recover, where the testimony is positive and direct that E. K. Valentine has no interest in the premises.

The judgment of the district court is reversed, and the cause dismissed.

JUDGMENT ACCORDINGLY.

JOHN CAMPBELL, PLAINTIFF IN ERROR, v. WM. SUTTON, DEFENDANT IN ERROR.

Practice: STRIKING TRANSCRIPT OF JUSTICE FROM FILES. The cause was tried before a justice of the peace and judgment for the plaintiff. The defendant takes it to the district court on error. Petition in error and undertaking for supersedeas filed in district court, May 31, 1880. Transcript filed in district court, Nov. 12, 1880. May 3, 1881, motion by plaintiff, there defendant in error, to strike transcript from the files, for causes stated at length in the opinion. Motion denied. *Held*, No error.

THIS was an action of forcible entry and detention brought before a justice of the peace, by John Campbell, who obtained a judgment of restitution there. William Sutton, the defendant, took the case on error to the district court, and on trial before Pound, J., judgment was rendered in his favor, reversing the judgment of the justice, etc., to reverse which Campbell brought the case here on a petition in error.

R. B. Windham, for plaintiff in error, cited *City of Brownville v. Middleton*, 1 Neb., 10. *Maxwell's Justice*, 145, 254. *Swan's Treatise*, 192.

Stevenson & Murfin, for defendant in error.

COBB, J.

There is but one question presented in this case in such

a way that we can examine it. That is the first one presented by the petition in error, as follows:

I. The court below erred in overruling the motion of this plaintiff in error, to strike from the files of said court the transcript of the record of proceedings of Michael Archer.

The original judgment in the case was rendered by Michael Archer, justice of peace, on the 21st day of May, 1880. On the 31st day of May, 1880, the petition in error and undertaking for supersedeas were filed in the district court. On the 12th day of November, 1880, a transcript was filed in the district court. On the 3d day of May, 1881, a motion was made in the district court to strike the said transcript from the files, and the denying of which motion is assigned for error in this court. The grounds of said motion, as set out therein, are four:

I. For the reason that it does not contain the evidence taken in the trial before said justice.

II. For the reason that said transcript was not filed within the time required by law.

III. For the reason that it appears to be no part of plaintiff's petition in error.

IV: For the reason that it does not show that the exceptions taken to the rulings of the justice were signed and allowed by him, and the bill of exceptions copied into the docket as required in actions of forcible entry and detainer.

The plaintiff in error in his brief argues this point as though the motion clearly presented the point that the defendant in error did not, in bringing the case on error to the district court, "file with his petition a transcript of the proceedings containing the final judgment or order, sought to be reversed, vacated, or modified," as required by sec. 586, Comp. Stat., p. 607, and it will be so considered.

It seems that the first thing done in this case in open court was the presentation of this motion to strike this.

Campbell v. Sutton.

transcript from the files. It was then on the files of the case properly certified and endorsed, and there could be no possible doubt of its being the paper which it purported to be.

In the case of the *City of Brownville v. Middleton*, 1 Neb., 10, cited by counsel for plaintiff in error, the district court of Nemaha county had rendered a judgment against the plaintiff. It caused to be filed with the clerk of the supreme court a transcript of the record of the district court, and also caused a summons in error to be issued and served. But it did not file any petition in error. The plaintiff in error moved for leave to file a petition in error instanter. Defendant in error moved to dismiss the summons in error. This court, by the present Chief Justice, held "that the supreme court obtained jurisdiction to review a judgment at law rendered by a district court, only by the petition in error. That must be filed with the transcript, and before the summons is issued. Until it was filed, there was no authority for issuing the summons, and the writ was void. It could not be filed afterwards, so as to retain the summons in error, which had already been issued and served."

In the case at bar the district court had obtained jurisdiction of the subject matter and of the person of the there plaintiff in error, by means of the filing of the petition in error, and of the person of the there defendant in error by means of the summons in error. Thus having jurisdiction of the case, that court could supply every defect in the record necessary to the full consideration and disposition of it. It could, if necessary, compel the justice to furnish a transcript of the proceedings before him. If so, then by a lesser exercise of the same power, it could accept and file one voluntarily furnished, or, finding one on file, it could retain it for the purposes of the case, although it had not been filed contemporaneously with the petition in error.

As to the first ground contained in the motion "that it (the transcript) does not contain the evidence taken in the trial before the justice, we do not know of any law or rule which necessarily requires the justice to enter down on his docket the testimony given before him in a trial of this or any other kind of action, so that a true transcript would necessarily contain such evidence. Either party can, if he chooses, preserve such evidence in a bill of exceptions. And while it would be good practice for a justice to spread all bills of exceptions signed by him at length on his docket, yet the statute requiring it is not very clear, and in practice is difficult, if not impracticable, of observance. And in case where it is not observed that fact would certainly not deprive either party of the benefit of a transcript.

The second ground stated in the motion seems to have been abandoned, and is not true in point of fact.

As to the third ground, "That it appears to be no part of plaintiff's petition in error," it need only be said that the transcript need not, nor can it, be any part of the petition in error. Strictly speaking they should be filed together, but one is no part of the other.

The fourth ground is but a repetition of the first, and nothing more need be said on that point.

We therefore reach the conclusion that the district court did not err in denying the motion of plaintiff in error—there defendant in error—to strike the transcript from the files.

The only other point made in the petition in error is the general one: "That the said district court erred in reversing the judgment of the said Michael Archer, justice of the peace," etc.

By reference to the petition in error, filed in the district court by the plaintiff, defendant in error here, it will be seen that most of the points therein made are of such a character as to depend upon evidence introduced or

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offered at the trial before the justice. Therefore, as none of the testimony is brought to this court, we must presume that the judgment of the district court thereon is correct. The judgment of the district court reversing the judgment of the justice of the peace, and retaining the cause for trial in said court on the merits, is affirmed.

JUDGMENT AFFIRMED.

12	536
38	88
38	850
12	536
40	838
13	526
49	880
12	536
60	841
12	526
62	679

HENRY G. HIBBELER, PLAINTIFF IN ERROR, v. JOHN GUTHEART, THE STATE OF NEBRASKA, ALBINUS NANCE, ITS GOVERNOR, SAMUEL J. ALEXANDER, ITS SECRETARY OF STATE, GEORGE M. BARTLETT, ITS TREASURER, FRANCIS M. DAVIS, ITS COMMISSIONER OF PUBLIC LANDS AND BUILDINGS, AND CALEB J. DILWORTH, ITS ATTORNEY GENERAL, DEFENDANTS IN ERROR.

School Lands. J. G. was in possession of a piece of school land as lessee, from the state, was in default of the payment of interest thereon, had been notified of such delinquency by the county treasurer, but no proceeding had been taken to dispossess him, when H. G. H. applied to the proper county officers and had the said land appraised, took out a lease for the same, surrendered his lease and applied to purchase the same, and perfected his purchase thereof according to the forms of law, except that the board of commissioners for the sale, leasing, etc., of the school lands, etc., refused to make or deliver to H. G. H. a contract of sale of the said land. *Held*, That the above facts constitute no cause of action on the part of H. G. H. against J. G. or the state board.

ERROR to the district court for Douglas county. Heard below on demurrer to petition, before SAVAGE, J. Demurrer sustained, and cause dismissed.

John D. Howe, for plaintiff in error.

C. A. Baldwin, for defendants in error.

COBB, J.

The plaintiff in error, who was plaintiff in the court below, presented his petition alleging that the said state officers constitute the board of commissioners for the sale, leasing, and general management of all lands and funds set apart for educational purposes and for the investment of school funds, created by the constitution and laws of the state of Nebraska; that on or before the 10th day of September, 1879, the lands hereinafter described belonged to the state of Nebraska, and were a part of what were known as its school lands, and were subject to lease and sale as such, as by law provided; that such lands are described as follows, to-wit: The southwest quarter of the northwest quarter, and the northwest quarter of the southwest quarter, and the southwest quarter of the southwest quarter of section thirty-six, in township fifteen north of range 12 east, in Douglas county, Nebraska, being 120 acres of land, known in said laws as the class designated prairie lands; that on or about September 10th, 1879, he leased said lands of and from said state in the manner provided by law; that prior to the 27th day of December, 1879, and about the 15th day of December, 1879, as such lessee he applied in writing to the county treasurer of such county, to have such land appraised for the purpose of sale, whereupon, upon the payment of six dollars by said lessee, said treasurer, together with the county clerk and county judge of said county, appointed appraisers, who appraised said lands at their just and true value, and returned their appraisal under oath as by law required; that within ten days after said appraisal, the said treasurer forwarded the same, together with the written application aforesaid, to the office of the said commissioners at or about said time, to-wit: December 27th,

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1879; that said applicant, at or about said time, made a written surrender of his lease, and purchased said land at its appraised value ascertained as above, to-wit: \$10.00 per acre, all as by law provided, but avers the truth to be that said state, said board, and said officers refused to make or deliver to plaintiff a contract of sale of said land, for the reason hereinafter shown, although plaintiff has in all respects complied with the law in that behalf, and paid, on or about January 1st, 1881, the sum of \$64.00 interest and \$120.00 principal, upon the purchase price, and has since paid the accruing interest thereon, to-wit, \$64.80, on or about January 1st, 1881; that at a hearing had before said board, between the said Gutheart and the plaintiff, on or about April 26th, 1880, it decided the plaintiff had no right to said land, and refused to recognize his right thereto hereinbefore described, on the grounds below shown; but plaintiff avers that said hearing was informal and unauthorized by law, and that the decision of said board was ineffectual to determine or impair any right of the plaintiff in or to said land; that said defendant, Gutheart, is in possession of said real estate, claiming under a lease thereof, made to one Elizabeth Davis, about August 14th, 1869, by said state, that said lease having been, as claimed by defendant, assigned to one H. N. Goff, and by him assigned to said Gutheart prior to 1875, but avers the fact to be that said lessee and her assigns, including said Gutheart, failed to keep the covenants contained in said lease; that they, or either of them, paid no rents thereon after January, 1875, till after the date above named and the right of the plaintiff had accrued; and further says that notice of such default was served upon said parties, and each of them, prior to the passage of the act of the legislature concerning said school lands and funds, approved February 19th, 1877, as by law provided, on December 23rd, 1876, and on other days before and after, and that by reason of the

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premises all rights and interests of said Gutheart in or to said land have been cut off and lost prior to the passage of said act, and that said Gutheart has since remained in possession thereof unlawfully and as a trespasser; that afterwards, on or about August 14th, 1878, said contract or lease under which said Gutheart claimed was formally cancelled of record, but that afterwards, as claimed by said Gutheart, and after plaintiff had purchased said land as aforesaid, said state, by its officers and agents, pretended to reinstate said lease under which said Gutheart claimed, in consideration of the payment by him or by some person ostensibly for him, of the rental so as aforesaid in default, under said lease, thereby assuming to cut off the rights in and to said land acquired by the plaintiff, upon the sole ground that said Gutheart had not had notice of the default above described, as required by law, and contrary to the facts in that regard; that plaintiff has sold, assigned or transferred no interest in said land, etc., and prays judgment and general relief.

To this petition the defendant Gutheart filed a general demurrer, which was sustained by the district court, and the plaintiff failing to plead further a general judgment was entered for the defendant, Gutheart, and dismissing the action. The said plaintiff brings the cause to this court on error.

The plaintiff in error, in his brief, claims under the provisions of law as found in the General Statutes, secs. 17 and 18, pp. 194 and 195, and suggests that if he has no case under these provisions he has none at all.

The case of the plaintiff, in effect, admits that the defendant, Gutheart, and those under whom he claims, were at one time in the rightful and exclusive possession of the lands in controversy; that he is now in the actual possession, but by virtue of the proceedings set out in the petition he, the plaintiff, has in the mean time become the

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lawful owner and entitled to the possession thereof. The provisions of sec. 18 above referred to are as follows :

Sec. 18. In case of the violation of any of the covenants in the contract furnished by the lessee or purchaser by the nonpayment of money at the time specified in the contract, by the commission of waste upon the land, by removal of any improvements thereupon from the land without the consent of the commissioners, the county treasurer shall notify the lessee or purchaser of his or her delinquency and require the removal thereof by the fulfillment of the covenant of the bond and contract, and if such delinquency is not removed within thirty days, the lessee or purchaser shall yield possession of the premises to the state of Nebraska, and the property shall thereupon immediately revert to, and be revested in, the state; and the contract shall be dissolved, and the rights of the lessee or purchaser, both legal and equitable therein, be absolutely determined, and the prosecuting attorney of the district shall, immediately after receiving such notice from the county treasurer of the violation of his or her covenants, by the lessee or purchaser of any school land, proceed against the person in possession of the premises involved, in the name of the people of the state of Nebraska for forcible detainer, and obtain restitution of the premises in the same manner and with the like effect as in case of tenants holding over. In case of the violation of contracts by the lessee or purchaser of school lands, the county treasurer shall accompany his notice of such delinquency to the prosecuting attorney with attested copies of all papers which may prove the covenants and the violation thereof.

It was evidently the intention of the legislature, in passing the law containing these provisions, to hold the purchasers and lessees of the school lands to the strict performance of the terms of their obligations to the state. And while by the terms of the law all delinquents were limit-

ed to thirty days from the receipt of notice of such delinquency in which to remove the same, by payment, yet we think it was the policy of the law to allow them to do so at any time before the commencement of suit to dispossess them, by the prosecuting attorney, as provided for in the section. While the lessee is in possession, and not proceeded against in the manner provided by law, he is presumed to have rights, and these rights could only be cut off by the method pointed out in the name of the people, and not by proceedings moved by and in the name of an individual designing to become the purchaser or lessee, or otherwise. While the state can have no preferences as between different citizens, yet as the law does not favor forfeitures, it will always favor the removal of delinquencies, on the part of those already its lessees and in possession, rather than the forfeiture of their rights to make room for others.

We do not think it within the intention or policy of the law that the state should in any case give a second lease or contract for any portion of the school lands while the original lessee, or his lawful assignee, is in possession, claiming to be so rightfully. Such a policy would tend to litigation and in many instances to social disorder. To avoid this the law has provided a cheap and expeditious method for dispossessing its delinquent lessees and purchasers, and thus clearing the field for new applicants, whom it can let into immediate and undisputed possession.

It appearing from the petition that the defendant, Gutheart, was in the possession of the school lands during the whole of the proceedings on the part of the plaintiff, under which he claims, and still is, we think that the judgment of the district court is right, and it is accordingly affirmed.

JUDGMENT AFFIRMED.

GEORGE H. GUY, PLAINTIFF IN ERROR, v. C. H. DOWNS,
ET AL., DEFENDANTS IN ERROR.

Homestead. D. was the owner of a homestead consisting of two lots in the city of O., on which were situated the dwelling house and a large horse barn. A judgment was rendered and docketed against D., October 28, 1874. In 1876, D. left home and the state, for a temporary purpose, intending to return, leaving his wife and family occupying the homestead. Mrs. D. leased the barn to a tenant for a term of one year, reserving certain privileges. Execution issued and levied on so much of the ground as was covered by the barn. On claim of exemption and injunction, *held*, that such leasing of the barn, and its use by the tenant, was not inconsistent with the occupancy of the homestead by the debtor, and a decree making the injunction against the sale on execution perpetual affirmed.

ERROR to the district court for Douglas county. Tried below before SAVAGE, J.

W. J. Connell, for plaintiff in error.

John D. Howe, for defendant in error.

COBB, J.

This was an action in equity brought by the defendant in error against the plaintiff in error, who was the sheriff of Douglas county, and others, to enjoin the sale of certain premises claimed to be exempt as a part of the homestead of the plaintiffs in said action, and which had been levied upon and advertised for sale by the said sheriff, to satisfy an execution against the said plaintiffs. On the trial the district court found the issues for the plaintiffs, and the injunction was made perpetual by final decree. The cause is brought to this court on error.

The only error assigned is, that said judgment is against law, and not sustained by the evidence.

The testimony is to the effect that C. H. Downs and Cornelia C. Downs, husband and wife, together with their

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family, for many years owned and occupied lots one and two, in block eighty-seven, in the city of Omaha, as their homestead. These lots were improved by a large two story house, situated about the center of the two lots, with the usual outbuildings, and a horse barn, situated west of the house, and extending nearly to the west line of the west lot. This barn had been built by C. H. Downs for domestic use, and was occupied by him for stabling his family horses and cow, storing hay, etc. About the year 1876, C. H. Downs, having been unfortunate in financial transactions and being reduced in circumstances, temporarily left Omaha, and went to some part of the mining country and engaged in prospecting for mines, leaving his family, consisting of his wife and two daughters, together with his wife's father, in the occupancy of the homestead. Some time after the departure of C. H. Downs, the family, no longer keeping horses, had but little present use for the barn, and rented the same out for one year to parties for the purpose of a livery or boarding stable, reserving however "the right of necessary room in the loft for the use of storing a few stoves, also reserving the right of way about the said premises to care for one cow, and room for hay for said cow." After the lessee had taken possession of the barn under said lease, the twenty-two feet of the lot on which the said barn stands was levied on, and advertised for sale, by the plaintiff in error.

The only question in the case is whether the leasing of the barn as above stated amounted to an abandonment of the right of exemption in the property levied upon. It is not claimed, nor could it be, in view of the whole current of authorities, that the going away of C. H. Downs, in the manner and for the purpose above stated, amounted to an abandonment of his homestead right. This being the case, it may be pertinent to consider whether the doing of any act in his absence, by his wife,

or any other person, without his authority, could have the effect to deprive him of this important right in any part of his homestead.

It was agreed at the hearing that the judgment upon which it was sought to sell the property in question, having been rendered in 1874, this case comes under the provisions of section 525 of the General Statutes, which is as follows :

"A homestead, consisting of any quantity of land, not exceeding one hundred and sixty acres, and the dwelling house thereon, and its appurtenances, to be selected by the owner thereof, and not included in any incorporated city or village, or instead thereof, at the option of the owner, a quantity of contiguous land, not exceeding two lots, being within an incorporated town, city, or village, and according to the recorded plat of such incorporated town, city, or village, or in lieu of the above, a lot, or parcel of contiguous land, not exceeding twenty acres, being within the limits of an incorporated town, city, or village, the said parcel or lot of land not being laid off into streets, blocks, and lots, owned and occupied by any resident of the state being the head of a family, shall not be subject to attachment, levy, or sale, upon execution or other process, issuing out of any court in this state, so long as the same shall be owned and occupied by the debtor as such homestead."

The language of this section is not involved in any obscurity, and to the mind of the writer it is difficult to conceive it to be susceptible of but one meaning. The object of the law is to exempt, and save to the debtor and his family a home or place to live, be that home a farm in the country, a suburban residence within the corporate limits, but not within the laid out and platted portion of an incorporated town, city, or village, or a town, city, or village home, being within an incorporated town, city, or village, and according to the recorded plat of such incor-

porated town, city, or village; in other words, in the platted and recorded part thereof. In the first case such homestead is limited to one hundred and sixty acres of land, "and the dwelling house thereon and its appurtenances." In the second case, as the writer has arranged them, inverting their order—the homestead thus exempted is limited to "a lot or parcel of contiguous land, not exceeding twenty acres, being within the limits of an incorporated town, city, or village, the said parcel or lot of land not being laid off into streets, blocks, and lots. In the third case the homestead is limited to "a quantity of contiguous land not exceeding two lots, being within an incorporated town, city, or village, and according to the recorded plat of such incorporated town, city, or village." And the exemption of such homestead, of whichever kind it may be, is limited to residents of the state, and in respect to duration to "so long as the same shall be owned and occupied by the debtor as his homestead." This quantity of contiguous land, not exceeding two lots, having the homestead character impressed upon it, becomes, in view of its occupancy as such, one piece of property; so that the occupancy of one lot or one-half of the whole is, in contemplation of the statute, the occupancy of the whole.

No one will doubt that a homestead as above limited and defined would be occupied as such, within the meaning of the statute, by a residence thereon by the debtor and his family in a house of the smallest dimensions, although the entire balance of such land were suffered to go to waste or lie common. And why would it be any the less so occupied if such balance were put to some useful purpose? We can see no reason, even although such purpose might involve the joint occupancy of other persons. It is neither within the letter or the spirit of the statute that the occupancy of the homestead by the debtor should be exclusive. He fulfils the terms of the law by

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continuing to occupy, and while he does so, he can do or suffer any other lawful thing in reference to the premises not inconsistent with his said occupancy.

In the case at bar, when Mrs. Downs leased the barn, she reserved certain room and accommodation in and about it for the purpose of storing stoves, and keeping a cow, hay, etc., so that in the strictest sense the debtor continued to occupy the barn. But we choose rather to put this opinion on the broader ground. The decree of the district court is affirmed.

DECREE AFFIRMED.

CEPHAS SIMMONS, PLAINTIFF IN ERROR, v. MIRANDA MINICK,
DEFENDANT IN ERROR.

Ejectment: EVIDENCE. In a trial in ejectment the plaintiff introduced record evidence of a tax deed from the county treasurer to one W. for the premises in controversy, and a chain of conveyances from W. to the plaintiff, and also proved actual possession for six years of all the premises conveyed, except a triangular strip, 160 rods in length by ten feet in width at one end and running to a point at the other, which strip adjoined the land of and was in the possession of the defendant, who produced no evidence of title. *Held*, That the plaintiff was entitled to recover.

ERROR to the district court for Richardson county.
Tried below before WEAVER, J.

Schoenheit & Thomas, for plaintiff in error.

Isham Reavis and Frank Martin, for defendant in error.

MAXWELL, J.

This is an action of ejectment. The plaintiff alleges in his petition that he is the owner and entitled to the immediate possession of the east one-half of the south-west one-fourth of section 32, town 2 north, range 16 east,

and that ever since July, 1878, the defendant has unlawfully kept him out of the possession "of a triangular strip on the east side of said land measuring one hundred and sixty rods, on the south side thereof ten feet, and bounded on the west by a line drawn from the n. e. corner of the lands first above described to a point ten feet west of the s. e. corner of plaintiff's land first herein described." The answer is a general denial. On the trial of the cause the attorneys for the plaintiff offered in evidence the record of deeds of Richardson county, for the purpose of showing a tax deed, dated December 4th, 1864, from David R. Holt, treasurer of Richardson county, to John G. White, for the lands in controversy, as the foundation of the plaintiff's title. Objections were made to the introduction of this record and deed, which are not now before the court and will not be considered. The record and deed were admitted in evidence. The plaintiff then introduced in evidence the record of a deed from White to the plaintiff. He then introduced evidence tending to show that he was in actual possession of all the land above described, except the strip in controversy, and also evidence that in the year 1875 he had broken up and put in cultivation a considerable portion of said land, and that he had fenced and otherwise improved it. It appears from the record that the quarter section of land directly east of that claimed by the plaintiff belongs to the defendant; that a former owner of that tract set out a hedge about 160 rods in length on what was supposed to be the line between the land of the plaintiff and defendant, but that while the north end of the hedge was upon the line, the south end extended on the land above described and claimed by the plaintiff, about ten feet, and this is the strip in dispute. The plaintiff called the county surveyor and offered to prove that the hedge in question was upon the plaintiff's land, but the evidence was excluded. The plaintiff then offered to prove that

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the hedge in question was set out by a former owner of the land belonging to the defendant, who by mistake set the hedge across the line, etc. This was also excluded. There were other offers to which it is unnecessary to refer. The defendant offered no evidence. The jury returned a verdict for the defendant, upon which judgment was rendered dismissing the action.

The question to be determined is, was the plaintiff entitled to recover upon the evidence before the jury? We think he was entitled to verdict. He showed record evidence of a tax deed from the treasurer of Richardson county to White, and a continuous chain of title from White to the plaintiff, while the defendant showed no title whatever. Objection is made to the form of the deeds, but that question is not before the court. The case is here on error, and only the errors assigned can be considered. The deeds were admitted in evidence, and where no complaint is made to the admission the presumption is that none exists. It may be doubtful, however, whether the defendant can insist upon irregularities in the plaintiff's title. She does not claim to be the owner of the land or entitled to the possession, and, so far as this record discloses, is a mere intruder. See Blackwell on Tax Titles, 78, note 1. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

GEORGE W. MITCHELL, PLAINTIFF IN ERROR, v. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

; **Liquor Selling:** RECOVERY OF PENALTY BY CIVIL ACTION. An action to recover the penalty, under section 574 of the criminal code of 1873, is properly a civil action, and may be commenced by summons.

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2. ———: ———. An action to recover the penalty, under section 574 of the criminal code of 1873, was dismissed by a justice of the peace, because no oath charging the offense had been made, or warrant issued for the accused. *Held*, That a judgment of the district court reversing the judgment of the justice and reinstating the case was not erroneous.

ERROR to the district court for York county. Tried below before Post, J.

Scott & Conner, for plaintiff in error.

C. J. Dilworth, attorney general for the State.

MAXWELL, J.

On the 30th day of July, 1880, Charles Penn filed a complaint before E. W. Cherry, a justice of the peace of York county, charging George W. Mitchell with the violation of section 574 of the code of criminal procedure. A summons was duly issued and served upon Mitchell, who, on the return day of the summons, filed a motion for a change of venue. The case was afterwards, by consent, transferred to J. S. Bennett, another justice of the peace of that county. The attorney for Mitchell thereupon filed a motion to dismiss the action, and the motion was sustained and the cause dismissed. The case was taken on error to the district court, where the judgment of the justice was reversed, and the case retained for trial in the district court, and judgment for \$19.48 costs rendered against Mitchell. He now brings the cause into this court by petition in error.

Sec. 574 of the criminal code, as it existed at the time this action was commenced, reads as follows:

"Any person licensed as before provided, who shall give or sell any malt, spirituous, or vinous liquors, or other intoxicating drink, to any minor, apprentice, or servant, under twenty-one years of age, without the consent of the parents, guardian, or master thereof, shall forfeit and pay for each offense the sum of twenty-five

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dollars for the use of the school fund, to be recovered by the proper action, before any justice of the peace of the proper county, upon the complaint of any person who will file with such justice a statement in substance as follows: A. B. complains of the violation of section five hundred and seventy-four of the criminal code. And on the proof of the violation of said section, or any part thereof, the justice shall render judgment for the whole amount of fine and costs, and the person so convicted shall be committed to the common jail until the same is paid." Gen. Stat., 852.

Sec. 12, art. I, of the constitution, provides that, "no person shall be compelled, in any criminal case, to give evidence against himself, or be twice put in jeopardy for the same offense."

Blackstone defines a crime or misdemeanor to be "an act committed or omitted in violation of public law, either forbidding or commanding it." 4 Bl., Com., 5. This definition, however, fails in precision, as it fails to distinguish between cases where the punishment of an offense, such as selling liquor in violation of law, is punishable by indictment, or where the proceeding is by an action of debt. An action on a penal statute to recover money as a penalty is a civil action. 1 Bishop Crim. Law, sec. 32. *People v. Hoffman*, 3 Mich., 248. *Keith v. Tuttle*, 28 Me., 326, 335. *Indianapolis v. Fairchild*, 1 Cart. Ind., 315. *Belcher v. Johnson*, 1 Met., 148. *Buckwalter v. U. S.*, 11 S. & R., 198. *Rogers v. Alexander*, 2 Green, 443. *People v. Ontario*, 4 Denio, 260. And the action may be in the name of the state; but this does not make the cause a criminal one. *Webster v. The People*, 14 Ill., 965. The true test is to enquire whether the proceeding is by indictment or action. If by indictment, the cause is criminal; if by action, the cause is civil. Tested by these rules it will be seen at once that this is a civil action. The object is to recover a money judgment, and the fact

that the law designates a specific amount does not change the character of the action.

Second. Does the fact that the justice dismissed the action operate as a discharge of the plaintiff? In other words, does the constitutional provision that the accused shall not be twice put in jeopardy for the same offense apply to mere civil actions for the recovery of penalties? We think not. The constitutional inhibition applies only to criminal proceedings—such offenses as are designated by our statute as felonies or misdemeanors. See 1 Bishop on Cr. Law, sec. 656. This action was commenced as a civil action, by summons, for the recovery of a specific sum of money, for the payment of which it was alleged the plaintiff was liable by reason of having sold liquor to a minor. The plaintiff moved to have the cause dismissed because it was not commenced as a criminal action, and he was not brought into court by a warrant. The motion was sustained on those grounds. The plaintiff, therefore, by his pleadings, recognizes the fact that he has not been put in jeopardy under the criminal law. That the justice had jurisdiction of the action and erred in dismissing it is clear, and the district court did right in reversing the judgment of the justice and reinstating the case. The judgment for costs is merely for the costs incurred in the proceedings in error, and was properly rendered. There is no error in the judgment, and it is affirmed.

JUDGMENT AFFIRMED.

19 541
39 637

THE CITIZENS BANK, PLAINTIFF IN ERROR, v. B. F. RYMAN,
DEFENDANT IN ERROR.

1. *Promissory Notes: BONA FIDE PURCHASER.* A bank purchased secured and unsecured notes before the maturity thereof, for

about three-fifths of their face value. In an action on one of the notes, there being no testimony tending to show their actual value, *held*, that the price paid was not sufficient to justify a jury in finding that the bank was not a *bona fide* purchaser.

2. ———: FAILURE OF CONSIDERATION. In an action upon a promissory note given for fruit trees, the defense was a failure of consideration and breach of warranty, but there was no testimony tending to show the loss of trees or a breach of warranty. *Held*, a failure to prove the defense.

ERROR to the district court for Fillmore county. Tried below before WEAVER, J.

Hastings & McGintie, for plaintiff in error.

W. H. Morris, for defendant in error.

MAXWELL, J.

This is an action upon a promissory note given for fruit trees. The defense is a failure of consideration. The note is dated Oct. 28th, 1878, due in one year with interest, and payable to the order of Dewitt & Smith. On the 27th of October, 1879, the plaintiff purchased the note in question, together with a number of other notes, for about three-fifths of their face value. From this consideration alone the jury seem to have thought that the plaintiff was not a *bona fide* purchaser, and found for the defendant. There is no testimony in the record showing the value of these notes, and, for aught that appears, the plaintiff may have paid not only a fair but full value for them. A material inquiry in such case is the solvency of the maker, or the character of the security, if any. The question of a *bona fide* purchase must be determined by the simple tests of honesty and good faith on the part of the purchaser.

But, even as between the original parties to the note, there is an entire failure of testimony to invalidate the consideration. It is stated that Dewitt & Smith warranted the trees, but there is no testimony whatever

Harrall v. Gray.

tending to show that the trees did not live, or that the alleged warranty has been broken, and the answer, in our opinion, fails to state a defense, there being no allegation of breach of the alleged warranty. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

12 548
36 606

CHARLES HARRALL, PLAINTIFF IN ERROR, v. ELI GRAY, DEFENDANT IN ERROR.

1. Joinder of Actions. A cause of action to recover the possession of land, and for rents and profits, may be joined.
2. Limitation of Actions. An action for rents and profits is barred in four years, and is not limited to the time of service of summons in the action.

ERROR to the district court for Richardson county.
Tried below before WEAVER, J.

A. R. Scott and *J. R. Wilhite*, for plaintiff in error.

A. Schoenheit and *E. W. Thomas*, for defendant in error.

MAXWELL, J.

This is an action of ejectment. Judgment was rendered in the court below in favor of Gray, for the recovery of the premises in dispute, and \$200.00 for rents and profits. None of the errors relied on in the motion for a new trial, to secure a reversal of the judgment in ejectment, are referred to in the plaintiff's brief, and therefore seem to be waived, and will not be considered. But it is insisted that the court erred in rendering judgment for the rents and profits of the land in dispute.

The sixth subdivision of section 87 of the code provides

Harrall v. Gray.

that the plaintiff may unite several causes of action in one petition, whether they be such as have heretofore been denominated legal, or equitable, or both, when they are included in either of the following classes, * * *

* * * "Sixth. Claims to recover real property with or without damages for the withholding thereof, and the rents and profits of the same."

The code has substituted for the action of trespass for *mesne* profits an action which is described as a claim for damages for the withholding of real property, and for the rents and profits. This action is limited to four years, while an action of ejectment may be brought within ten years. But such cause of action under the code may be joined with an action to recover the land. These are separate and distinct causes of action, and should be separately stated and numbered in the petition. The jury must find separately upon the issues.

It is claimed, on behalf of the plaintiff, that the fourth section of the occupying claimants act has repealed the law authorizing a recovery for rents and profits. The section reads as follows: "That the jury impaneled as above shall immediately proceed to view the premises in question, and then and there on oath or affirmation assess the value of all lasting and valuable improvements made as aforesaid on the lands in question, previous to the party receiving actual notice as aforesaid of such adverse claim, and shall also assess the damages, if any, which the said land may have sustained by waste, together with the net annual value of the rents and profits which the occupying claimant may have received from the same, after having received notice of the plaintiff's title, by the service of process, and deduct the amount thereon from the estimated value of such lasting and valuable improvements, and said jury shall also assess the value of the land in question at the time of rendering judgment as aforesaid, without the

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improvements made thereon, or damages sustained by waste as aforesaid." [Comp. Stat., 966].

It will not be claimed that the words of the section are sufficient to bar a right of action. The jury, so impaneled, are to assess, 1st. The value of lasting and valuable improvements. 2nd. The damages which the land may have sustained from waste, and the value of the rents and profits after service of summons in the action. 3rd. The value of the land without the improvements at the time judgment is rendered. If, on the trial, a recovery for the rents and profits is had up to the time of trial, the jury selected to appraise the improvements should not include in their estimate the rents and profits after the action is commenced, and if they do so, the court should order it stricken out of the finding or order a re-appraisalment. In our opinion, the section referred to does not debar a plaintiff from maintaining an action to recover rents and profits for such length of time, within four years, as he may be entitled to the same. No error has been pointed out in the amount of the verdict.

It is unnecessary to discuss the question of the right of Harrall to payment for lasting improvements made on the land in dispute, as it does not appear that any request was made by him for a jury to assess the same. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

MARK H. GARTRELL, APPELLEE, v. JULIA A. STAFFORD,
APPELLANT.

1. **Specific Performance.** An action for the specific performance of a contract for the sale of real estate is of two fold character, viz: *in rem* and *in personam*, and may be brought against a non-resident defendant in the county where the land in controversy is situated.

12	545
16	289
17	483
12	545
33	779
12	545
32	676
32	698
39	711
12	545
36	498
12	545
55	238

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2. —: JURISDICTION. The jurisdiction of courts of equity, to decree specific performance of contracts for the sale of real estate, is not limited as in cases respecting chattels, to special circumstances, but is general.
3. **Vendor and Vendee: TITLE.** Where the vendee is willing to accept the vendor's title, the vendor cannot set up as a defense to the action a defect in his title.
4. —: STATUTE OF FRAUDS. The statute of frauds only requires the vendor to sign the contract, or memorandum thereof, for the sale of lands.
5. **Proving contract by letters.** Where a contract is sought to be proved by letters, there must be testimony tending to prove the handwriting, or that they came from the defendant or an authorized agent, or were received in due course of mail in answer to letters mailed to the address of the alleged writer.

ERROR to the district court for Gage county. Tried below before WEAVER, J.

Colby & Hazlett, for appellant, on question of jurisdiction cited *Pawling v. Bird*, 13 Johns., 192. *Leith v. Leith*, 39 N. H., 20. Brown on Frauds, sec. 452. *Armstrong v. Katterhorn*, 11 Ohio, 272. On question of title, cited *Watts v. Waddle*, 1 McLean, 200. *Bates v. Delaran*, 5 Paige, 299. *Fitzpatrick v. Featherstone*, 3 Ala., 40. On question of admissibility of letters, etc., cited Greenleaf on Evidence, chap. 6. *Coleson v. Thompson*, 2 Wheat., 396. On question of power of court to decree specific performance, cited *Seymour v. Delancy*, 3 Cow., 445. *Modisett v. Johnson*, 2 Blackf., 431. *Carr v. Duval*, 14 Peters, 79. *Walters v. Brown*, 7 J. J. Marsh., 123. *Goodwin v. Lyon*, 4 Porter, 297.

Pemberton & Forbes, for appellee, cited *inter alia*, *Bush v. Miller*, 13 Barb., 487. *Cunningham v. Bank*, 21 Wend., 557. 1 Greenleaf Ev., sec. 573 a, and 577, note 1. 2 Starkie Ev., *373. *Goodell v. Hibbard*, 32 Mich., 47.

MAXWELL, J.

This is an action to enforce the specific performance of an alleged contract for the conveyance of real estate. The

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land in controversy is situated in Gage county, and the plaintiff is a resident of that county, while the defendant is a resident of California. The contract was made by certain real estate agents on behalf of the defendant, upon the authority of certain letters signed "Mrs. Julia A. Stafford." A decree was rendered in the court below in favor of the plaintiff. The defendant appeals to this court. It appears from the evidence that during the summer of 1879 a letter, of which the following is a copy, was delivered to Messrs. Somers & Schell, real estate agents, Beatrice.

MONTICELLO, NAPA Co., CALIFORNIA, June 11, 1879.

Real Estate Agent, Beatrice, Neb. Dear Sir: Not being acquainted with the name of a real estate agent in your place, you will excuse the omission. I have a farm in Gage county, Neb., which I am very desirous to sell, and want to put it into the hands of some agent who will attend to it promptly. I will sell it very cheap as I am in California sick, and need the money. It is known as the "Stafford farm" and has belonged to me and my husband, now deceased, over twenty years, you can see the deed recorded in the Beatrice clerk's office. It is situated on the Little Nemaha river. It is a fine farm, well watered, and well timbered, with plenty of rich bottom land. Several years ago, C. E. Moore, residing in the same neighborhood, offered me two thousand dollars for it, but I did not then wish to sell. I have lately offered it for eighteen hundred dollars, but if you take it in hand I would like for you to do the best that you can. G. Hillman, of Hooker, eight miles distant from my place, has charge of it, and has rented it to Peter Stockhouse. I would like to hear from you immediately, and if you will attend to this promptly, it is all that I can desire.

Yours very respectfully,

Address: MRS. JULIA A. STAFFORD,
Monticello, Napa Co., California.

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To this the following letter was sent directed to "Mrs. Julia Stafford, Monticello, Napa county, California: "

Yours of the 11th inst. has fallen into our hands. We will take charge of your land and sell it to the best advantage as soon as possible. Please give us the terms upon which you are willing to sell. It is very hard to get all cash down for land. If you will take one-third down, and balance in one and two years at ten per cent on deferred payments, we could sell quicker no doubt. But give us your terms and we will go to work and sell as quick as possible. Yours,

SOMERS & SCHELL.

To this they received the following reply:

MONTICELLO, NAPA CO., CAL., June 24th.

Messrs. Somers & Schell, Beatrice, Nebraska: Yours of June 18th, came promptly to hand to-day, and I hasten to reply. The place at \$1,800.00 cash, would be very cheap. I would much prefer to sell at that figure for cash, than to get more and wait; but if you cannot sell at that figure for cash, I will take \$2,500.00, one-third down, and the balance in one and two years at 10 per cent interest on remainder, with mortgage for security on the place. If possible, I would like to have it sold before the first of next September. The place is an uncommonly good one, and I am very anxious to sell. Please do the best you can, and thanking you for promptness in the matter, I am yours very respectfully,

MRS. JULIA STAFFORD,

Monticello, Napa Co., Cal.

In reply Somers & Schell sent the following,

Sept. 6, --9

Mrs. Julia Stafford, Monticello, California. Dear Madam: We have an offer from M. H. Gartrell, of \$1,500.00, for your n. w. one-fourth 1 — 6 — 8, in this county. Will pay \$500.00 cash, balance in five annual payments of \$200.00 each, with 8 per cent interest. We tried to get better of-

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fer out of him, and told him what your price was. We however write you in regard to the matter. Write us by return mail. Yours truly,

SOMERS & SCHELL.

The letter received in answer to the above is as follows :

MONTICELLO, NAPA Co., CAL., Sept. 12th, 1879.

Messrs. Somers & Schell, Beatrice, Nebraska, Sirs: Yours of Sept. 6th is just received. I think the price too low, but as I am in very needy circumstances and must have money, I have after much deliberation concluded to take it. I am anxious for you to sell it, and close the affair as soon as possible, because I need the money at present very much. Yours truly,

MRS. JULIA STAFFORD,

Monticello, Napa Co., California.

On receipt of the letter of Sept. 12th, Somers & Schell addressed a letter to the defendant at Monticello, California, containing a deed for her to execute to Mr. Gartrell, etc. To this letter they received the following :

MONTICELLO, NAPA COUNTY, Sept. 30th.

Messrs. Somers & Schell : Yours of the 16th of September, with the deed, was received by me a few days ago. Owing to the fact that there is no notary public or proper official to sign the deed before, near here, I have been unable to return it and will not be able to send it back for about a week from this day. I therefore thought proper to drop you a line, to let you know the cause of the delay. I may just mention here in this connection, that before sending the mortgage and also the notes, I wish you to have them recorded. Send the notes and mortgage to my address at Germantown, Colusa Co., Cal., in registered letters in care of T. C. Hillman.

Very respectfully,

MRS. JULIA STAFFORD,

Germantown, Colusa Co., Cal.

On the 3rd of October of that year, a letter dated at

Monticello, California, signed "Mrs. Julia A. Stafford," was sent to Messrs. Somers & Schell, saying that the deed for the land in question would be sent on the 7th inst. It is unnecessary to refer to the other letters set out in the record.

No deed for the land in controversy has been received, and this action was brought by the purchaser to enforce the contract.

The first objection made by the appellant is, that an action of this kind can only be brought where the defendant resides or may be summoned. But this objection is not well taken. An action to enforce specific performance of a contract for the conveyance of real estate is of two-fold character, viz: *in rem* and *in personam*. In the one case the decree of the court operates directly upon the land. In the other, where the court has jurisdiction of the parties, it may compel them to perform, although the land may be situated outside the state. Story Eq. Jur., secs. 743, 744. *Bailey v. Ryder*, 10 N. Y., 363. *Newton v. Bronson*, 13 Id., 587. *Gardner v. Ogden*, 22 Id., 327. *Cleveland v. Burrall*, 25 Barb., 532. *Fenner v. Sanborn*, 37 Id., 610. *Burrall v. Eames*, 5 Wis., 260. There is no doubt that an action may be brought against a non-resident in the county where the land in controversy is situated.

The second objection of the appellant is that the plaintiff has an adequate remedy at law in an action for damages. The rule contended for by the appellant undoubtedly applies to contracts for the sale of personal property, the reason being that damages in such cases are readily calculated on the market price of property such as wheat, corn, wool, etc., like quantities of the same grade being of equal value, and thus afford as complete a remedy to the purchaser as the delivery of the property. *Adderley v. Dixon*, 1 Sim. & Stu., 607. But the rule is a qualified one and is limited to cases where

compensation in damages furnishes a complete and satisfactory remedy. Story's Eq., S. 718, and cases cited in note 3. The jurisdiction of courts of equity to decree specific performance of contracts for the sale of real estate is not limited, as in cases respecting chattels, to special circumstances, but is universally maintained, the reason being that a purchaser of a particular piece of land may reasonably be supposed to have considered the locality, soil, easements, or accommodations of the land, generally, which may give a peculiar or special value to the land to him, that could not be replaced by other land of the same value, but not having the same local conveniences or accommodations. *Adderley v. Dixon*, 1 Sim. & Stu., 607, Story's Eq., sec. 746. Williard's Eq., 279. An action for damages would not, therefore, afford adequate relief.

The third objection is that there is no evidence as to the defendant's title to the land in controversy. There is a clear distinction between the case of a vendor seeking to compel a vendee to accept the vendor's title and perform the contract and that of a vendee resorting to an action in equity to require the vendor to perform. In the first instance, if the vendor cannot convey the title he professed to have and to have sold, the court will not compel the vendee to accept a less title than that contracted for; but this rule does not prevail where the vendee insists upon the performance of the contract, and is willing to accept the vendor's title. *Waters v. Travis*, 9 Johns., 450. *Sutherland v. Briggs*, 1 Hare, 34. *White & Tudor's Leading Cases*, 24.

The fourth objection is that there is no contract in writing. Our statute provides that "every contract for the leasing, for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, be in writing, and signed by the party by whom the

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lease or sale is to be made." Comp. St., 287. By the fourth section of the statute of frauds and perjuries, 29 Char. 2, it was enacted that "no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." The law is now well settled that under this statute the agreement need only be signed by him who is to be charged by it. *Seton v. Slade*, 7 Ves., 265. *Fowler v. Freeman*, 9 Id., 351. *Martin v. Mitchell*, 2 Jac. & W., 426. *Laythourp v. Bryant*, 2 Bing. N. C., 735. *Bal-lard v. Walker*, 3 Johns. Cases, 60. *Clason v. Bailey*, 14 Johns., 484. *McCrea v. Purmort*, 16 Wend., 460. *Penniman v. Hartshorn*, 13 Mass., 87. *Thayer v. Luce*, 22 Ohio State, 62. *Justice v. Lang*, 42 N. Y., 493. *Lowber v. Cornit*, 56 Wis., 176.

Chancellor Kent, in *Clason v. Bailey*, said that the weight of the argument was in favor of the construction that the agreement concerning lands should be mutually binding, and the same views were expressed by Verplank, senator, in the court of errors in *Davis v. Shield*, 26 Wend., 362, but both agreed that the law was well settled the other way both in this country and England. A change to conform to the views of Chancellor Kent was afterwards recommended by the revisors of the New York

statutes, but the legislature rejected the alteration and adhered to the old words. See Willard's Eq., 267-8. The same objection was made in the case of *Laythoarp v. Bryant*, where it was said that unless the agreement was signed by both parties there would be a want of mutuality, but the chief justice said, "Whose fault is that? The defendant might have required the plaintiff's signature, but the object of the statute was to secure the defendant's. The preamble runs, "For prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury," and the whole object of the legislature is answered when we put this construction upon the statute. Here, when the party who has signed is the party to be charged, he cannot be subject to any fraud. And there has been a little confusion in the argument between the consideration of an agreement and the mutuality of claims, * * * * I find no case, nor any reason in saying that the signature of both parties is that which makes the agreement."

It is sufficient if the contract or memorandum thereof is signed by the party to be charged, that is, by the vendor; but in this case the testimony tends to show that Somers and Schell were the agents of both parties, or middle men, and that, as such agents, they made the proposition of the plaintiff so that he would be bound by their acts in that regard. And, independently of such agency, bringing this action is an affirmation of his liability. If the signature of Mrs. Stafford is genuine we therefore hold that the contract is sufficient to entitle the plaintiff to recover.

A more serious question, however, arises as to the evidence of the signature of the defendant. The admission of the letters was objected to by the defendant. The entire business was carried on by correspondence, and there is no testimony in the record tending to show that these letters were written or signed by the defendant or by her

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direction. There must be testimony tending to prove that the letters purporting to be written by the defendant were written by her or by her direction, or that she was a resident at that time of Monticello, California, so that the letters received in due course of mail in answer to letters sent to the alleged writer may be presumed to have come from her. As the testimony fails in this regard the judgment of the district court must be reversed. The agents seem to have acted in good faith, and if the letters of the defendant are genuine the contract should be enforced. The cause is remanded for further proceedings.

REVERSED AND REMANDED.

JOHN GEHLING, PLAINTIFF IN ERROR, v. JOHN HINTON,
THOMAS BROWN AND ROBERT CLEGG, DEFENDANTS IN
ERROR.

Fraud: EVIDENCE. The sole question in the case being, whether G. was induced by the fraud of H. to give up the original note of H., B. & Co., *held*, that the admission of certain testimony, stated at length in the opinion, was error.

ERROR to the district court for Richardson county.
Tried below before WEAVER, J.

The plaintiff in his petition avers:

1. That defendants were partners, as Hinton, Brown & Co.
2. That on Sept. 20, 1877, they were indebted to plaintiff in the sum of \$478, and as such firm gave plaintiff a note therefor, due in fifteen months, (Dec. 1, 1878).
3. That on Dec. 20, 1878, plaintiff was paid part of interest accrued, leaving a balance on said note of \$500.
4. That defendants falsely and fraudulently represented to the plaintiff that defendant Hinton had three

good promissory notes of one Beaman, payable to Hinton, dated Sept. 7, 1878, each for \$200 and interest, payable in two, three, and four years, secured by a mortgage on eighty acres of land.

5. That defendants, for the purpose of inducing plaintiff to give up and release said firm note, falsely and fraudulently represented to plaintiff that said mortgage was a good and valid security, that the title to the land was good, and that if plaintiff would give up said firm note to Hinton, and take Hinton's note for \$500, dated Dec. 30, 1878, due in one year, with the Beaman notes and mortgage as collateral, the plaintiff would be more amply secured than with the firm note.

6. Plaintiff had no knowledge of Beaman, the title to the lands, or validity of the mortgage, but relying upon and believing said representations, and induced thereby, and for no other consideration gave up said firm note, and took Hinton's note with the Beaman notes and mortgage as collateral.

7. That Hinton and Beaman were then and still are insolvent, and said mortgage security then was, and still is entirely worthless.

8. That Beaman never had color of title, except that Hinton once had a pretended tax title, and conveyed the land to Fulton and Slocum as assignees; that afterwards he conveyed the same land to Beaman by a pretended conveyance, which was void. That the Beaman mortgage based thereon was also void; all of which was well known to defendants; and that

9. Defendants fraudulently concealed such facts from plaintiff. That plaintiff, relying upon and believing such representations, was induced to make such exchange as solicited by defendants.

10. Plaintiff tenders back the Hinton and Beaman notes and the mortgage.

11. Avers that no part of any of said notes was paid.

Gehling v. Hinton.

12. That the pretended release and surrender of said firm note was obtained by said fraud and fraudulent representations.

Defendants denied allegations of petition, averred that firm was dissolved May 1, 1878, that plaintiff knew of dissolution, etc., that he agreed to accept Hinton's note, etc.

Clegg filed separate answer averring that firm of Hinton, Brown & Co. was dissolved May, 1878; that he then accounted with other members of said firm, and that Hinton and Brown being indebted to him, assumed obligation to pay all outstanding debts; and he to secure his debt from them, took a chattel mortgage on a large amount of personal property which had belonged to said firm; that he retained said lien until after the settlement of all debts of firm; that after such dissolution, and while his lien was in force, plaintiff spoke to him, and he informed plaintiff that he had nothing to do with the same, and that plaintiff must look to Hinton and Brown for his pay, if any; and that without fraud on his part, settled with H. and B., and took notes of H. and B., with such security as was satisfactory to plaintiff, and then and there released him; and that he relying thereon, permitted H. & B. to dispose of said mortgaged property, and thereby lost his security; that he never knew, until about commencement of suit, that plaintiff had claim against him, and alleges that plaintiff is estopped to claim payment from him. Judgment below for defendants.

Burr & Kelly, for plaintiff in error.

Frank Martin, for defendants in error.

COBB, J.

The sole question involved in this case is whether Gehling was induced by the fraud of Hinton, or of any or all of the defendants to give up the original note of Hinton, Brown & Co., or not. If he was, then upon the return, or

offer to return of the Beaman notes and mortgage, and possibly without such return, he could recover against the late firm. The firm had the benefit of Gehling's labor, for which he has received nothing, and no settlement, or substitution of other securities, or the individual obligation of one of the partners, can be set up successfully against his claim, if the same is shown to have been brought about by the misrepresentations or fraud of all or any of those who now seek to avail themselves of such arrangement. This being the case, it is then quite apparent that much irrelevant testimony was received by the court, and presumably considered by it, in reaching the findings and judgment in the case.

Of this character is the testimony of defendant Clegg, as to the conditions of the dissolution, and as to what became of the securities taken by him as indemnity against having to pay any portion of the partnership debts. So also of the testimony of defendant Hinton, as to the financial responsibility of E. S. Towle. Neither this testimony, nor any answers to the questions objected to could throw any possible light upon the character of the representations and inducements, by means of which Hinton obtained the possession of the firm note. The tender of the quit claim deed from Fulton and Slocumb, assignees of Hinton and Litchte, was inadmissible on many grounds, and the deed tendered was no conveyance in form.

From a careful examination of the record, we think that the learned court, which tried the cause below, was mistaken in the true character of the question submitted for its decision, and believing that injustice has been done in the case, the finding and judgment of the district court are reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

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14	58
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38	263
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41	419
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45	625
19	558
55	649

GEORGE JENNINGS, ET AL., PLAINTIFFS IN ERROR, v. RICHARD D. SIMPSON, ET AL., DEFENDANTS IN ERROR.

1. **Setting aside verdict or finding.** To justify an interference with the finding of a court or jury, the preponderance of evidence must be clear, obvious and decided, but when the preponderance is so great as to lead to the conviction that the court or jury committed a mistake, then it is the duty of the reviewing court to correct that mistake.
2. **Judgment not impeachable collaterally.** A judgment rendered against a person—and equally so of one rendered in his favor—after his death is reversible, if the fact and time of death appear on the record, or in error *coram nobis* if the fact must be shown *aliunde*; it is voidable, and not void, and cannot be impeached collaterally. *Taple v. Titus*, 41 Penn. State., 195.
3. **Receivers.** A court of equity possesses the power to make all necessary orders for the control of receivers, referees and commissioners appointed by it, and such power is not limited by the provisions of sec. 602 *et seq.* of the code.
4. —: **JUDGMENT.** In an action wherein G. J. and another were plaintiffs, T. M. M. was attorney for plaintiffs, and R. D. S. was receiver. The court made an order finding a certain sum of money in the receiver's hands, which said order concluded in the following words: "and the said receiver is directed and ordered by the court, with the assent of G. J., to pay to T. M. M., one of the counsel for the said J., the sum of * * * It is further ordered by the court, that if the said R. D. S. shall fail for ten days after the rising of the court, to pay said money with interest to said M., that then written notice shall be served on said R. D. S. and his sureties, and if the said moneys are not paid within twenty days from the service of said notice, then, and in that case, said M. may institute a suit at law against the sureties of the said R. D. S., to recover said moneys with interest;" *held*, that the only right or interest in, or control over, said money which said M. derived by virtue of the said order, was in his capacity as attorney of said plaintiffs, and their right to, and property in said money remained paramount.

ERROR to the district court for Otoe county. Tried below before POUND, J.

S. H. Calkoun, for plaintiffs in error, cited on author-

Jennings v. Simpson.

ity of Scofield to appear as attorney, *Field v. Gibbs*, 1 Pet., C. C., 155. *Reed v. Pratt*, 2 Hill, 64. *Insurance Co. v. Oakley*, 9 Paige, 496. *Grant v. White*, 6 Cal., 55. *Brown v. Nickolls*, 42 N. Y., 26. Receiver is officer of court and continues until he is discharged. *Edwards on Receivers*, 4. *Winfield v. Bacon*, 24 Barb., 154. Judgments for or against deceased persons are *not* void on that account. *Collins v. Mitchel*, 5 Flor., 364. *Loring v. Folger*, 7 Gray, 505. *Coleman v. McAnulty*, 16 Mo., 173. *Yaple v. Titus*, 41 Pa. S., 203. *Day v. Hamburg*, 1 Browne, 75. *Gregory v. Haynes*, 21 Cal., 443. *Spalding v. Wathen*, 7 Bush., 659. *Camden v. Robertson*, 2 Scam., 508. *Sloetzell v. Fullerton*, 44 Ill., 108. *Case v. Ribelin*, 1 J. J. M., 30. *Swasey v. Antrim*, 24 Ohio S., 87. *Powell v. Washington*, 15 Ala., 803.

J. L. Mitchell and *Frank P. Ireland*, for defendants in error.

The order at April term, 1873, was final and conclusive. *Embury v. Conner*, 3 N. Y., 511. *Voorhees v. The Bank*, 10 Pet., 449. *Noble v. Cope*, 50 Penn. State, 17. *Wood v. Jackson*, 8 Wend., 1. *Young v. Black*, 7 Cranch, 565. *Supervisors v. Briggs*, 2 Denio, 33. *White v. Coatsworth*, 6 N. Y., 113. The jurisdiction of the district court as to the order of April, 1873, had ceased long before the application to modify the same in 1877 was made, and unless that application was made for or on account of one of the grounds or causes set forth in sec. 602 code, the court in that proceeding acted without, and outside of, and beyond its jurisdiction, and such proceeding and the order made therein, is null and void, and may be shown to be so in any collateral or other proceeding in which it is drawn in question. *Gilliland v. Sellers' admr.*, 2 Ohio State, 223. *Morse v. Presby*, 5 Foster, 299. *Eaton v. Badger*, 33 N. H., 228. *Dicks v. Hatch*, 10 Iowa, 380. *State v. Fodick*, 21 La. An., 258.

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Moore v. Ellis, 18 Mich., 77. *Damp v. Town of Dane*, 29 Wis., 419. As to power of court to render judgment for or against a deceased party, see *Lee v. Gardiner*, 28 Miss., 521. *Norton v. Jamison*, 23 La. Ann., 102. *McCreery v. Everding*, 44 Cal., 286.

COBB, J.

It appears from the record in this case that in December, 1870, there was pending in the district court of Cass county an action wherein George Jennings *et al.* were plaintiffs, and William E. Sheldon *et al.* were defendants, and in which case the defendant in this action, Richard D. Simpson, was appointed receiver by the court. This action is brought upon the receiver's bond, then given by the said Simpson, the other defendants herein being his securities thereon. It further appears that in April, 1873, the said receiver made to the said court a report, upon which report, after disallowingsundry items thereof, the court found that there was then a balance in said receiver's hands of \$343.51, which he was ordered to pay over without delay "to T. M. Marquett, one of the counsel for the said Jennings," the said order reciting that the said direction to make such payment to T. M. Marquett was made "with the assent of George Jennings." The said order also recited that the said receiver had commenced sundry actions at law for certain demands growing out of his management of the property in controversy, and in his hands as such receiver, which suits the said receiver was directed to prosecute to final determination, keeping a full and accurate account of all expenditures of money in and about the same. That the consideration of all questions for allowance of compensation for services and expenses connected therewith was postponed to the coming in of a special report upon the cases respectively, etc. It further appears that at a term of said district court of Cass county, held in the year

1877, a motion was brought before said court for the purpose of modifying and correcting the said order so as to include a certain sum of money which it was alleged had been paid to the said receiver and not accounted for by him. That said receiver was not present at said last mentioned term, nor was he personally notified of such proceedings for the reason that he had removed from the state, but that G. B. Scofield was notified thereof as the attorney of the said receiver, and that he being unable to attend procured Geo. S. Smith, an attorney of said court, to attend in his stead, who did appear and took part in said proceedings on behalf of the said receiver, and that thereupon such proceedings were had therein that an order was had and made therein by the said court, requiring the said receiver, within sixty days from the date thereof, to pay into court the sum of eighteen hundred sixty-eight dollars and seventy-two cents. That afterwards, it being discovered that a mistake had been made in the computation of interest, a remittitur of one hundred dollars was made from the said amount, leaving the same to stand at \$1768.72. The said sum, nor any part thereof, having been paid, this action was brought in the district court of Otoe county by the said George Jennings and the legal representatives of Ann Maria Jennings, deceased, against the said receiver and the other defendants as securities on his bond as such receiver, they, the said securities, being residents of said Otoe county. Said cause was tried to the court, which found the issues for, and rendered judgment in favor of the defendants. The plaintiffs bring the cause to this court on error.

The principal if not the only issue of fact presented by the record is, whether G. B. Scofield was the attorney of said receiver, so that a notice or citation could properly be served on him, so as to bind the said receiver by the proceedings had in the said district court of Cass

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county in 1877. On this point there is a conflict of testimony. But a careful examination leads us to the conclusion that such conflict is rather apparent than real. To reverse the order of the testimony. The defendant, Simpson, in his deposition, testified as follows: "Yes, I know G. B. Scofield, he never was my attorney as receiver in Cass county, Neb. He never had anything to do with my receivership in Cass county, Neb. He never was with me in Cass county to my recollection, and never appeared for me in Cass county court with my knowledge or consent, and never was authorized to appear for me in any case in Cass county. I attended the receiver's business in person. I made the report and the settlement in April, 1878, in person. In the case above referred to in Otoe county against George Jennings and his securities, G. B. Scofield was my attorney." In the receiver's account filed in court in April, 1878, there is an item of disbursement of \$30.00 for "cash paid G. B. Scofield, services as attorney."

On the other hand G. B. Scofield himself in his deposition testified as follows:

Q. Who was the attorney of Richard D. Simpson, as the receiver of Jennings, Sheldon, Bayley and Goode-nough?

A. I was his attorney, that is, Simpson's attorney.

Q. Were you present at the court in Cass county, Nebraska, when he made any settlement as such receiver?

A. I was present at every settlement except the last, I think.

Q. You may state the circumstances of Simpson's settlement as receiver?

A. He made several partial settlements from time to time as ordered by the court. The final settlement he delayed making for sometime. Messrs. Calhoun & Croxton, attorneys for George Jennings, served notice upon me as the attorney of Richard D. Simpson, as receiver, to have him

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make his final report. The motion was heard at the Cass county district court before Hon. S. B. Pound, then judge of said court. The papers of Simpson, as such receiver, with his final statement of account, together with my brief to be used in the argument of the motion for final settlement of Simpson, I sent to Hon. George S. Smith, an attorney of the Cass county bar, requesting him to attend to the case before the court for me, which he did. From some cause, which I do not now remember, I was unable to be present myself, and so got Mr. Smith to attend to the matter for me.

Q. What other attorney, if any, did Richard D. Simpson have or employ for him in connection with his business as receiver?

A. None whatever to my knowledge except myself. I attended to all his business in that respect, both in Cass and Otoe counties, and in all matters where the services of an attorney were required.

S. H. Calhoun, a witness at the trial, testified as follows:

"Some time in 1870 Mr. Croxton and myself, being partners in the law business, brought the suit in Cass county of George and Ann Maria Jennings v. Bayley, Sheldon, Goodenough and others. In that case we made application for a receiver, and a receiver was appointed, Richard D. Simpson, on the giving of a bond in the sum of \$20,000, by order of Judge Lake. * * * * Mr. Simpson went out and came into the office again and notified us that he had retained Mr. Scofield."

Q. By the court: Do you know he was the attorney?

A. Yes, sir, I know Mr. Scofield was his attorney in the Cass county matter and all other matters.

Q. By the court. In the matter of receivership?

A. Yes, sir. On the morning of going there, I know he appeared in the court with Scofield and sat with him that day along and pointed out different matters. I

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know that this record—a copy of which is attached to a deposition—bears the endorsement of Gilbert B. Scofield. I knew him to be his attorney from the fact that he was constantly consulting him * * * * I know it because Mr. Simpson told me so distinctly, and I know it further from his appearing in the case on the first hearing of the receiver's report. He was present in court. Mr. Scofield and Mr. Simpson sat near together, and Mr. Simpson was constantly prompting him during that proceeding, which lasted nearly all day.

T. J. Stevenson, who was a witness at the trial, testified as follows:

Q. Were you in the Cass county district court during the April term, 1873?

A. I believe I was, I won't be sure, I was there nearly every term.

Q. Are you personally acquainted with R. D. Simpson?

A. Yes.

Q. State who acted as his attorney at that hearing?

A. Mr. Scofield. They were both there.

This court has often held that the verdict of a jury, or the finding of fact by a trial court, will not be reversed by this court on a mere preponderance of evidence, but to justify such reversal this court must find the testimony to be clearly against the finding.

In the case of *Fried v. Remington*, 5 Neb., 525, this court, by the late C. J. Gantt, laid down the rule in the following words: "To justify an interference with the finding of a court, or jury, the preponderance of evidence must be clear, obvious, and decided; but when the preponderance is so great, it is the duty of the reviewing court to correct the mistake." The writer has always understood the syllabus in that case as though it read: "but when the preponderance is so great as to lead to the conviction that the court or jury committed a mistake,

then it is the duty of the reviewing court to correct that mistake." And thus understanding the rule, we consider it clearly applicable to the case at bar.

It seems clear to us that no one reading the testimony, as above quoted, could, without committing a mistake or inadvertence, come to the conclusion that G. B. Scofield was not the attorney of Simpson in the matter of the receivership in question.

G. B. Scofield being the attorney of Simpson, the latter having departed from the state, and ceased to be an inhabitant thereof, notice of the proceedings in the Cass county district court having been served on the said attorney, and he having through his substitute, G. S. Smith, also an attorney of said court, appeared in said court in response to said notice, and resisted and participated in said proceedings, the order of said court of 1877 is not void, and hence cannot be collaterally attacked, and is binding upon the district court of Otoe county in the proceeding under consideration.

The point is made by the defendants in error that the orders of the district court of Cass county, as well that of 1873 as that of 1877 are void, for the reason that Ann Maria Jennings, one of the plaintiffs in the original action had deceased prior to the date of the first named order. While the authorities applicable to this point are by no means uniform, or free from conflict, yet we consider the weight of authority to be as laid down by the supreme court of Pennsylvania, in *Yaple v. Titus*, 41 Penn. State 195, in the following words: "A judgment rendered against a person (and equally so of one rendered in his favor) after his death is reversible, if the fact and time of death appear on the record, or in error *coram nobis*, if the fact must be shown *aliunde*; it is voidable and not void, and cannot be impeached collaterally."

As to the point made by defendants in error that the order of April, 1873, was final and conclusive as to all

Jennings v. Simpson,

transactions of the receiver which were or might have been settled and determined upon the hearing then had, etc., it may be sufficient to say, that neither the account rendered by the receiver at that time, nor the order of the court thereon purport to be final. But on the contrary, by the terms of said order, the said receiver is directed to continue the prosecution of sundry law suits already instituted by him for the recovery of moneys due him as such receiver, to make special reports thereof to the court, etc. It should also be borne in mind that this receiver was acting in a fiduciary capacity towards the parties to the original suit, as well as towards the court, and if in tendering his account of transactions of which he had peculiar and perhaps exclusive means of knowledge, he either through fraud or mistake omitted important items of charges to himself or of credits to the fund for which he was accountable, it was clearly within the power and duty of the court to take the necessary steps for the rectification of such error, and the proceedings for such purpose are not within the provisions of sec. 602 *et seq.* of the code, but depend upon the general powers of a court of equity.

It is obvious from an inspection of the said order of April, 1873, that the money therein mentioned was made payable to T. M. Marquett only in his capacity of attorney for the plaintiffs in the original action, and that the control thereof, nor the property therein, were thereby vested in the said Marquett in any other character or respect than as attorney for the plaintiffs, and for their use and benefit. The finding and judgment of the district court are therefore reversed, and the cause reinstated and remanded to the district court for further proceeding in accordance with law.

REVERSED AND REMANDED.

JEREMIAH D. ROMIG, ET AL., APPELLANTS, v. THE WEST
POINT BUTTER AND CHEESE ASSOCIATION, ET AL., AP-
PELLEES.

12	567
16	593
16	595
18	510

1. **Corporations: CONTRACT: FRAUD.** Upon the case stated at length in the opinion, *held*, that the contract could not be so modified or changed by them (Neligh, Brown and Crawford), at that time, and acting in their individual capacities, or under any delegated power which they or either of them are shown to have possessed, so as to affect the interests of the creditors and lienholders of the West Point Manufacturing Company; and any combined attempt to affect their interests injuriously on the part of persons standing in the relation to them borne by the said Neligh, Brown and Crawford, the law, without regard to motives, would designate a confederation and conspiracy to defraud.
2. ———: ———: **RESCISSION.** That the original contract between the West Point Butter and Cheese Association, and the West Point Manufacturing Company, which was consummated by the acceptance on the part of the Manufacturing Company of the proposition of the Butter and Cheese Association, the execution and delivery to the president of the said association of the coupon bonds and deed of trust provided for in said contract, and the execution and tender to the said association of the majority of the stock of the said Manufacturing Company, was never rescinded or modified, so as to affect the rights or interests of the creditors or lien holders of the said Manufacturing Company or of the said John D. Neligh.
3. ———: ———: **TRUSTS.** The said Benjamin D. Brown, president of the defendant association, having accepted the trust in and by the said deed of trust set forth and expressed, whatever acts were by him done and performed in and about the buying of judgments, liens, or other evidences of indebtedness, against the said Manufacturing Company, or any of its property, buying tax certificates, or paying taxes on any of its property, the purchasing in of any of its property at sheriff's, marshal's, or commissioner's sale, or otherwise, either by himself, his agents, or attorneys, or any officer, agent, or member of the said West Point Butter and Cheese Association—will, so far as the rights and interests of the plaintiffs and cross petitioning defendants are concerned, be held to have been done in pursuance of the

Donig v. The West Point Butter and Cheese Association.

said trust and for the benefit and protection of the said Manufacturing Company, its rights, and property.

4. ——— : ——— : ———. As under the terms of the contract between the West Point Butter and Cheese Association, and the West Point Manufacturing Company, it was the duty of the said association, its president and members, to negotiate and pay at par for the said \$35,000 of coupon bonds, which were by the said Manufacturing Company delivered to the president of said association and retained by him, they will, so far as the rights and interests of the plaintiffs and cross petitioning defendants are concerned, be deemed and held to have done so, and to have disbursed the moneys by them used in buying the said judgments, liens, tax titles, and property by them or any of them purchased at said judicial and tax sales or otherwise, in trust for, and for the use and benefit of the said Manufacturing Company, and to hold the undisbursed balance of said \$35,000 for such use.

5. ——— : ——— : ——— : **CONFLICTING RIGHTS AND LIENS.** All rights claimed by the said West Point Butter and Cheese Association, or of any officer or member thereof, under or by virtue of any deed, conveyance, or lease, from the West Point Manufacturing Company, or any member, officer, or attorney thereof, or of any county treasurer, sheriff, marshal, or commissioner, for, or on account of any taxes, judgment, or decree, against the West Point Manufacturing Company, or the said John D. Neligh, or the said Catherine B. Neligh, and any and all claim for liens upon any of the property of the said Manufacturing Company for repairs or betterments, are held and declared to be subject and inferior to, and to in no wise affect injuriously the rights, liens, or interests of the plaintiffs, or cross petitioning defendants, or any or either of them.

THIS was an action brought in the district court for Cuming county, by judgment creditors of John D. Neligh and the West Point Manufacturing Company, for the purpose of subjecting the property and assets of said West Point Manufacturing Co. to the payment of their claims; for a determination of the priorities of the respective liens against said property and assets; and for having certain apparent liens against said property and assets, decreed to have been paid. Certain of the defendants answered setting up their judgments, and filed

cross petitions for relief. The finding below by BARNES, J., was in favor of the Manufacturing Co., the Butter and Cheese Association, and others impleaded with those corporations, a decree entered dismissing the petitions of plaintiffs and cross petitioning defendants, who thereupon brought the case here on appeal.

John D. Howe, R. F. Stevenson, and Uriah Bruner, for appellants.

J. C. Crawford, for appellees.

COBB, J.

J. C. Crawford, agent of the West Point Manufacturing Company, with full power and authority from said company in its behalf, applied to the West Point Butter and Cheese Association, at its principal office at Middletown, New York, for a loan of \$35,000, to be evidenced by the interest bearing coupon bonds of the first named company. The declared object of such loan was to enable the said first named company to pay off its indebtedness, estimated at \$30,000, but which it was believed could be bought in at from \$15,000 to \$25,000, and to give it a working capital for the purpose of operating its mills. After attending two meetings of the Butter and Cheese Association, Mr. Crawford was met by the following counter proposition: "If the West Point Manufacturing Company, or John D. Neligh, will donate to the undersigned West Point Butter and Cheese Association a controlling interest in its stock, it—the West Point Butter and Cheese Association—in consideration thereof, agrees within ninety days from the date of the delivery of a majority of said stock, to negotiate a loan for said company of \$35,000, bearing ten per cent. Principal payable in two to five years. Loan to be secured by a first mortgage bond on the real estate of said company, and to be negotiated at par. All real property remaining after paying off loan

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and making additions or repairs, is to be divided as follows, to-wit: The present stockholders to get two-thirds, and the new stockholders one-third. The profits of the business to be divided equally among all stockholders." Dated, Middletown, Aug. 9, 1878; and signed by the president of said West Point Butter and Cheese Association.

This proposition Mr. Crawford received from the said West Point Butter and Cheese Association, and with it returned to West Point. A meeting of the board of directors of the said West Point Manufacturing Company was immediately called; the said counter proposition of the West Point Butter and Cheese Association laid before the said board of directors; and resolutions adopted in due form accepting the same, and ordering the officers of said company to make the necessary arrangements to carry the same into effect without delay. At the same meeting a resolution was also duly passed in the following words: "Resolved, that the president and secretary of the West Point Manufacturing Company be and are hereby authorized and directed to issue 35,000 dollars of coupon bonds of said West Point Manufacturing Company, bearing ten per cent interest, payable five years from date thereof. That said company sell said bonds at their par value and apply the proceeds thereof toward the paying of the debts of said company, and the liens against its said property, and the repairing and operating its mills, etc. That the president and secretary are further authorized to execute and deliver a trust deed to secure the payment of said bonds, on the real estate of said company."

The above meeting was held on the 27th day of August, 1878. On the 2nd day of September, following, the president and secretary of the West Point Manufacturing Company executed and delivered the deed of trust of the said company to Benjamin D. Brown, trustee, who was also the president of the West Point Butter and Cheese

Association, to secure the payment of seventy bonds for the sum of five hundred dollars each, with interest coupons attached, etc., therein specifically described. The said deed of trust was also at the same time signed by the said Benjamin D. Brown, in evidence of his acceptance of the said trust. The seventy bonds for five hundred dollars each were also on the same day delivered to the said Benjamin D. Brown, who took the same, as well as the said deed of trust, to the office of the West Point Butter and Cheese Association at Middletown, New York.

It appears from the testimony, that between the last above date and the 21st of October following, the said Benjamin D. Brown was back and forth between West Point, Nebraska, and Middletown, New York, two or three times, remaining about an equal portion of his time at either place. While at West Point he was busy examining the mills, water power, and other property of the West Point Manufacturing company, and looking into its business and affairs. He never called on the president or secretary of the West Point Manufacturing Company for the certificate of stock in said company, or any other evidence of the ownership by the West Point Butter and Cheese Association of a majority of the stock, or any stock of the West Point Manufacturing Company. But the certificate or certificates for said stock were made out to the said West Point Butter and Cheese Association, signed by the president and secretary, and verified by the seal of said West Point Manufacturing Company. There is evidence, which however is contradicted, that said certificates of stock were tendered to said Benjamin D. Brown for and on behalf of the said West Point Butter and Cheese Association by the secretary of the said West Point Manufacturing Company, some time between said 27th day of August and the 21st day of October. But there is no dispute that, on or before the last mentioned date, the said certificates of stock were

in the office of J. C. Crawford for the purpose of delivery to said Benjamin D. Brown as president of said West Point Butter and Cheese Association; that they were then offered to him; and, while he did not manually accept of them, yet they were then, and continued to remain, virtually under his dominion and control.

On the same day, the 21st or 22nd of October, B. D. Brown, for the first time, informed John D. Neligh or any one else, except J. C. Crawford—and he, at this time at least, must be looked upon rather as his legal adviser than as the agent or attorney of the West Point Manufacturing Company—of his intention not to go on and complete the transaction according to the agreement. And it was at this time, if at all, that the agreement was novated or modified so as to take it out of the terms of the counter proposition of the West Point Butter and Cheese Association, as accepted and acted upon by the West Point Manufacturing Company, so as to allow the West Point Butter and Cheese Association, or B. D. Brown, its president, or any other of its officers or members, to go on for an indefinite length of time and buy up the claims and liens against the West Point Manufacturing Company and its real estate, upon the terms and conditions that, if the said West Point Butter and Cheese Association, B. D. Brown, its president, or its other officers or members, or all together, could and would buy up all of said debts, judgments, and liens for an aggregate sum within the said sum of \$85,000, then that all of said debts, judgments, and liens should be assigned to the said West Point Manufacturing Company; but if not, then that the said West Point Butter and Cheese Association B. D. Brown, its president, or any other officer or member, buying up any of such debts, judgments, or liens, might hold them against the said West Point Manufacturing Company the same as any other lien holder might; and that in the mean time, the said contract for the loaning of the

said sum of \$35,000, the said deed of trust and bonds, should stand indefinitely suspended.

The weight of evidence is to the effect that at this time such a modification of the terms of the contract was made, in so far as the same could be done by the said Neligh, Brown & Crawford, acting in their several individual capacities only. But we are of the opinion that the contract could not be so modified or changed by them at that time and acting in their individual capacities, or under any delegated power which they, or any of them, are shown to have possessed, so as to affect the interests of the creditors and lien holders of the said West Point Manufacturing Company; and any combined attempt to affect their interests injuriously on the part of persons standing in the relation to them borne by the said Neligh, Brown & Crawford, the law, without regard to motives, would designate a confederation and conspiracy to defraud.

Long before the time of which we are now speaking, Benjamin D. Brown had accepted the trust as trustee under the deed of trust, and on the part of said West Point Butter and Cheese Association had accepted the said deed of trust and the said bonds of thirty-five thousand dollars, and had the said bonds and deed of trust either in the possession of the said West Point Butter and Cheese Association or that of the bank at Middletown, New York. It is claimed on the one part, that about this time it was discovered by the said Benjamin D. Brown that he had been deceived by the representations of the officers and agents of the West Point Manufacturing Company as to the amount of the debts and liens then outstanding against the said West Point Manufacturing Company and its property, and for that reason he rescinded the said contract. Without stopping to inquire whether he had good or sufficient cause for a rescission of the said contract or not, it is very clear from the evidence that he did none of

those things which would amount to a rescission either at law or equity. He released none of the advantages which the contract gave either himself or his association; nor did he do anything toward placing the West Point Manufacturing Company in *statu quo*. It will not be presumed that Neligh and Crawford, whose chief avowed object in all this business was to relieve the West Point Manufacturing Company from the pressure of debt, would have allowed an additional burden of thirty-five thousand dollars of a rescinded indebtedness to stand out in hostile hands against it for a year and better, without protest or an attempt to call it in.

Whatever acts were done and performed by Benjamin D. Brown, after the acceptance of the trust as expressed in and by the trust deed, in and about the buying of judgments, liens, or other evidences of indebtedness against said West Point Manufacturing Company, or any of its property, buying tax certificates, or paying taxes on any of its property, the purchasing in of any of its property at sheriff's, marshal's or commissioner's sale, or otherwise, either by himself, his agents, attorneys, or any officer, agent, or member of the said West Point Butter and Cheese Association—must, so far as the rights and interests of the plaintiffs and cross petitioning defendants are concerned, be held to have been done in pursuance of the said trust, and for the benefit and protection of the said West Point Manufacturing Company, and its rights and property.

It is a well known principle of equity jurisprudence that that which ought to have been done by a person acting in a fiduciary or trust capacity, will, for the purposes of justice and equity, be deemed to have been done. Therefore, as it was the duty of the said B. D. Brown and the said West Point Butter and Cheese Association, its officers and members, to accept, negotiate, and pay for the said \$35,000 of coupon bonds, they will, so far as

the rights and interests of the plaintiff and cross pleading defendants are concerned, be deemed to have done so, and to have disbursed the moneys by them used in buying in the said judgments, liens, tax titles, and property by them, or any of them purchased at said judicial and tax sales, in trust for, and for the use and benefit of, the said West Point Manufacturing Company, and to hold the undisbursed balance of said \$35,000 for such use.

From the testimony of Mr. Brown, president of the West Point Butter and Cheese Association, it appears that it was never the intention of the said association, or the understanding between it and the West Point Manufacturing Company, that the coupon bonds issued by the latter company and delivered to the said Brown should in any event be sold to outside purchasers, but were to be held by him—as we understand the legal effect of his testimony—partly in his capacity as president of the one company, and partly as trustee of the other, until the deed of trust given to secure them should become the first lien on the property of the West Point Manufacturing Company, when the several members of the West Point Butter and Cheese Association were to take them “according to the ability of the members,” and that he, the said president, and trustees, had been ever since the receipt of said bonds and trust deed engaged in buying up the liens against the property of the manufacturing company with the funds of the Butter and Cheese Association, not for the purpose of making the said deed of trust the first lien upon the property described therein, and so perfect the arrangement as originally contemplated, but, as the witness naively puts it, “as an investment the same as any business man might.”

During this time, and as a part of the same general plan, the Butter and Cheese Association, or its president, by means of a lease, entered into the possession of the

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principal property of the said Manufacturing Company, and are still in possession, and have made extensive and costly improvements thereon, under claim of title thereto in themselves, under tax and judicial sales thereof, notwithstanding their having entered into the possession of the most and principal part of said property under and by virtue of a lease from the said West Point Manufacturing Company. The said Butter and Cheese Association claim to keep an account, not with said Manufacturing Company, but with the "West Point Manufacturing Company Investment Fund", to which it charges the judgments and liens bought in against said property and manufacturing company at their face value, including interest also on the money expended in the improvement of the said property, with the avowed intention on the part of the said Butter and Cheese Association and its officers, to hold the property as its own until the said Manufacturing Company shall pay off the account. Whether so intended or not, the inevitable effect of this is to postpone the rights of the creditors of the Manufacturing Company indefinitely. As to the *bona fide* creditors of said Manufacturing Company, whether holding liens or not, as well as all holders of liens upon the said property, whether dated prior or subsequent to the conveyance thereof from the Nelighs to said Manufacturing Company, they are entitled to have the real estate of the said West Point Manufacturing Company, or so much thereof as is sufficient to pay and satisfy their several and respective liens and judgments, absolutely free and discharged of any and all liens or claims of the said West Point Butter and Cheese Association, or of any officer, attorney or member thereof, by virtue of any lease, lien for repairs, or betterments, or of any sale for taxes, or on account of any judgment, decree, or lien bought in, held or claimed against said West Point Manufacturing Company, John D. Neligh, or Catherine B. Neligh, by the said

Leech v. Philpott.

West Point Butter and Cheese Association, or any officer, attorney, or member thereof.

The several findings and the decree of the district court are therefore reversed, the petition of the plaintiffs, together with the cross petition of the several cross pleading defendants, are restored and reinstated, and the cause remanded to the district court for further proceedings in accordance with the views expressed in this opinion.

. JUDGMENT ACCORDINGLY.

NATHANIEL LEECH, APPELLEE, v. JAMES E. PHILPOTT,
APPELLANT.

1. Evidence on Appeal. In cases appealed to the supreme court, the same steps are required to preserve the evidence for use on appeal as are required in a review by proceedings in error.
2. Practice on Appeal. Where the appellant fails to appear and point out any error in the judgment appealed from, and no error is apparent, the judgment will be affirmed.

MOTION to dismiss appeal.

M. H. Sessions, for the motion.

LAKE, CH. J.

It is shown by the record, that no bill of exceptions of the evidence has been settled as the statute directs. Sec. 676 civil code. Comp. Stats., 620. In cases appealed to this court, the same steps are required to preserve the evidence for use at the hearing on the appeal as if the review were sought by a proceeding in error. These steps are distinctly pointed out in sec. 311 of the civil code, Comp. Stats., 571. For the failure to comply with these provisions of the law in the preparation of the bill of exceptions filed herein, the motion to quash the same must

be sustained. And the appellant having failed to appear in this court and point any error in the judgment of the district court, and none appearing, it must be affirmed.

JUDGMENT AFFIRMED.

12	578
85	391
12	578
37	702
12	577
41	354
12	578
43	740
12	578
46	855

SULLIVAN SAVINGS INSTITUTION, APPELLEE, v. C. M. CLARK,
APPELLANT.

1. Practice: JUDGE'S MINUTES: JUDGMENT. The judge's minutes, as to entries made on the trial docket, are *prima facie* evidence of the proceedings in a case, but may be shown to differ from the judgment actually rendered. And the court cannot be compelled to correct its journal from such minutes.
2. Stay of Execution. After a party has applied for and obtained stay of order of sale, he cannot have the judgment reviewed on error or appeal.

APPEAL from Seward county. Tried below before Post, J.

M. H. Sessions, for appellant.

Norval Brothers, for appellee.

MAXWELL, J.

This is an action to foreclose a mortgage. It is alleged in the petition "that the said defendant, Cornelius M. Clark, heretofore, to-wit, on the 27th day of April, 1874, made, executed, and delivered to this plaintiff his one certain promissory note in writing at that date for the sum of five hundred dollars, payable April 27th, 1877," with interest at 10 per cent. It is also alleged that this defendant paid \$250.00 Nov. 5th, 1878, and \$20.30 Nov. 13th, 1878, on said note, and that there is still due thereon the sum of \$156.50 with interest at 10 per cent. from the 13th day of November, 1878. The answer is a plea

of usury, and that the defendant only received the sum of \$425.00 while giving his note and mortgage for \$500.00, with interest.

On the hearing of the case the court below found, in substance, that Farwell, who made the loan to the defendant, was the agent of the plaintiff, and that he loaned the defendant only the sum of \$425.00, and that there is usury in the transaction, and rendered a decree of foreclosure and sale in favor of the plaintiff, for the sum of \$146.70, and in favor of the defendant for the costs of the action. The decree was rendered May 4th, 1881, and on the 7th day of that month, the defendant filed a request for, and obtained a stay of order of sale for the period of nine months. In November, 1881, he filed a motion to amend and correct the judgment record by allowing the defendant \$150.00 in addition to the sum allowed him in the decree. The motion was overruled, to which the defendant excepted, and now assigns the same for error.

The error complained of is, that the court did not correct the decree from the entry made by the judge on the trial docket at the time the decree was rendered, from which it appears that there was no finding as to the amount due the plaintiff. There is no complaint that the amount of the decree is too large, or greater than the amount actually owing by the defendant to the plaintiff; but relief is sought on the sole ground that as there was no entry on the trial docket of the amount due to plaintiff therefore there was no authority to enter a decree for any amount whatever. This proposition is untenable. The judge's notes on the trial docket are merely memoranda of the proceedings of the court for the convenience of the court and clerk. And as to the entries made, while *prima facie* evidence of the proceedings of the court in a case, may be shown to differ from the judgment actually rendered. The judgment actually rendered is

spread at length on the journal of the court, and we know of no rule that would compel a court to enter a judgment different from that actually rendered simply because of a defect or omission in his notes of the trial on the docket.

We have discussed the question upon the theory that the defendant was entitled to a review of the case in this court. But sec. 5, of the act "to provide for stay of executions and orders of sale" approved Feb. 23rd, 1875, provides that, "no proceedings in error or appeal shall be allowed after such stay has been taken," etc. Laws of 1875, 50 [Comp. Stat., 590]. There is reason in this, as a party, by asking an extension of the time of payment, virtually admits the correctness of the obligation. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

TURNER, FRAZER & CO., PLAINTIFFS IN ERROR, V. JOSEPH KILLIAN, ET AL., DEFENDANTS IN ERROR.

1. **Sheriff: OFFICIAL BOND: LIABILITY OF HIS SURETIES.**
Where a sheriff, with a process against the property of one person, seizes, by virtue thereof, the property of another, he is guilty of official misconduct, for which he and his sureties are liable in an action on his official bond. Nor does it matter as to the liability of his sureties, whether he do this knowingly and willfully, or through gross carelessness, or mere indifference to official duty.
2. **Pleading: DEMURRER.** Where, notwithstanding formal defects in a petition, enough is alleged to support a judgment in favor of the plaintiff it is not subject to general demurrer.
3. **Chattel Mortgage: CONSIDERATION.** As to attachment creditors of the mortgagor a pre-existing debt, already due, is a good consideration for a chattel mortgage, and protects the mortgagee to the same extent as would a new consideration given at the time of making the mortgage.

12 580
18 83
22 187
23 634

12 580
33 133
33 507

12 580
31 467

12 580
37 857

12 580
43 229

43 827

12 580
47 913

12 580
49 943

49 769

50 200

51 97

54 559

54 666

12 580
58 617

12 580
59 21

4. ———: POSSESSION BY MORTGAGOR. A chattel mortgage of a stock of goods containing a clause, by which the mortgagor is given possession with power of sale in the usual course of trade, the proceeds to go in satisfaction of the mortgage debt, although by our statute made presumptively fraudulent, is not conclusively so, and may, by satisfactory evidence, be shown to have been made in good faith.
5. ———: FRAUD IS A QUESTION OF FACT. The question whether there was fraudulent intent in the giving of a chattel mortgage is, in all cases, one of fact, and must be raised, if at all, by suitable pleading.

ERROR to the district court for Hall county. Heard below before Post, J.

Abbott & Caldwell, for plaintiff in error, on liability of sheriff, cited *Noble v. Himeo*, ante p. 193. *Huffman v. Kopplekom*, 8 Neb., 344. *Brandt on Suretyship*, 627. *Cooley on Torts*, 397. On validity of mortgage, cited *Robinson v. Elliott*, 22 Wall., 513. *Frankhouser v. Ellett*, 22 Kan., 127. *Goodheart v. Johnson*, 88 Ill., 58.

Thummel & Platt, and *James H. Woolley*, for defendants in error, claimed that act of sheriff was a wilful trespass for which sureties are not liable, it being done *virtute officii*, and not *colore officii*. *Story v. Jennings*, 14 Ohio State, 43. *Ottenstein v. Alpaugh*, 9 Neb., 237. *Ex parte Reed*, 4 Hill, 572. *State v. Mann*, 21 Wis., 693. The mortgage was void. *Herman on Chattel Mortgages*, 222 to 236. 3 Neb., 76. 6 Neb., 392. 8 Neb., 373.

LAKE, CH. J.

This is a petition in error from Hall county. The action below was against Joseph Killian, the sheriff of that county, and his sureties, upon his official bond to recover damages alleged to have been sustained by the plaintiffs as mortgagees of certain personal property, in consequence of its seizure and sale by that officer under a process which he held against the property of the mort-

Turner, Frazer & Co. v. Killian.

gagor. To the petition several demurrers were interposed, one by the sheriff, and one by his sureties. These demurrers, which were general, were sustained, and it is this ruling of the court that is now complained of.

On behalf of the sureties it is claimed in support of the ruling upon their demurrer that, inasmuch as the petition shows the seizure of the goods to have been made by the sheriff after being fully advised by the plaintiffs of their claim to them, his act was a trespass for which they are not answerable. And cases are cited which support counsel in this view; but, as we think, the great weight of the authorities is the other way.

In the case of *The People v. Schuyler*, 1 Comstock, 173, it was held that: "Where a sheriff, having in his hands a process against the property of the defendant therein, seizes by virtue thereof the goods of another person, he is guilty of official misconduct, and he and his sureties thereby become liable on his official bond." To the same effect are the following of the numerous cases that might be cited. *Carmack v. Commonwealth*, 5 Binney, 184. *Commonwealth v. Stockton*, 5 Monroe, 192. *State, ex rel. Blinbury v. Mason*, 25 Wis., 684. *Moulton v. Jose*, 25 Me., 76. *Charles v. Haskins*, 11 Ia., 329. *Skinner v. Phillips*, 4 Mass., 68. And our own decisions upon the question are in accord with the view that, when a sheriff in the performance of his official duty is guilty of misconduct resulting injuriously whether to one, like a party to a suit, having a direct interest in his action, or to a stranger to the proceeding, both he and his sureties are answerable therefor.

In the case of *Kane v. Union Pacific Railroad Co.*, 5 Neb., 105, where one of the conditions of the bond of Kane as county treasurer was the same as the one now under consideration, viz: that "he shall faithfully and impartially, without fear, favor, fraud, or oppression, discharge all the other duties now or hereafter required of

his office by law," it was held that the exaction of illegal fees as treasurer rendered both him and his sureties liable.

Again, in the case of *Huffman v. Kopplekom*, 8 Neb., 344, where it was shown that the defendant, as sheriff, holding a process authorizing him to arrest one Clark, who was charged with a felony, through carelessness and unlawfully arrested the plaintiff, and in so doing seriously wounded him, we held that both the sheriff and his sureties were liable in an action on his bond.

Still another case possibly more directly in point, and recently decided, is that of *Noble v. Himoe*, ante page 193, in which a constable with an execution in his hands against the property of S., the keeper of a drug store, seized a lot of patent medicines held by the druggist for sale on commission, although duly notified that they belonged to another. It was held that the constable and his sureties were liable to the owner of the medicines for their value.

In the case now under consideration counsel for the defendant in error lay particular stress upon the fact of its being alleged in the petition "that the defendant Killian

* * * having full knowledge of plaintiffs ownership and possession, wrongfully and unlawfully broke into said store, seized said goods," etc., and claim that inasmuch as this shows a deliberate act of trespass it cannot properly be said to have been an official act. We think this position is untenable. The sheriff had the process of a court, which by the law he was directed to execute in a certain manner upon the property of the person named therein. The condition of his bond which ran to the county of Hall, for the benefit of the public, was that he would do this faithfully and without favor, or oppression, etc. This he did not do, but instead took the property of another and disposed of it in satisfaction of the writ. This very clearly was a violation of official duty and with-

in the contemplation of his bond, just as much so as if the act had resulted from gross carelessness, or mere indifference in performing the duty enjoined upon him.

Another point made against the petition is, that it does not show from what court, nor when, the order of attachment under which the sheriff seized the goods was issued. This certainly was a defect which ought not to have occurred, and might have required an amendment of the pleading as to those particulars if a motion to that effect had been made at the proper time. We think enough was alleged, although very informally, to support a judgment in favor of the plaintiff, and therefore the omission complained of did not render the petition demurrable.

The point is also made against the petition that the mortgage is shown to have been given without consideration and is therefore void. The only ground for this assumption is the fact that the mortgage was given to secure the payment of an antecedent indebtedness then past due. "A pre-existing debt is a valuable consideration for a mortgage and protects the mortgagee to the same extent that he would be protected if he had paid a new consideration at the time of the mortgage." Jones on Chattel Mortgages, sec. 81, and cases there cited. There is nothing in the fact of the mortgage having been given to secure the payment of a debt already due that denotes fraud in the transaction.

It is claimed also, that this mortgage is fraudulent and void as to the creditors of the mortgagor, because of the following provision contained therein, under which he retained possession of the property until just before the levy was made, viz: "Said goods, wares and merchandise are to be sold at retail for cash, and true and correct books of account are to be kept and the proceeds of the daily sales are to be turned over to said Turner, Frazer & Co., (the mortgagees) and applied upon the above mentioned notes, until the same are all fully paid off and discharged,

The said stock hereby mortgaged to be owned, held and controlled by the said party of the second part (mortgagee) until said notes are fully paid and cancelled. Said Sawyer, (the mortgagor), to act in the premises for said T., F. & Co., until said indebtedness is fully liquidated, after which this mortgage shall be cancelled, and the possession of the remainder to be surrendered to said Sawyer."

Under some circumstances a mortgagee may employ the mortgagor as his agent to take care of the mortgaged property, after he has taken possession of it. Jones on Chattel Mortgages, sec. 181. Doing this, or leaving the mortgagor in possession of the property, is of course under our statute evidence of fraud in the making of the mortgage, but until the instrument is attacked on that ground it cannot be judged fraudulent. Our statute of frauds has this provision: "Sec. 11. Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the thing sold, mortgaged, or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the person claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers." Under this provision it cannot reasonably be questioned, that if the goods are permitted to remain with the mortgagor, the mortgage as to his creditors, and subsequent purchasers in good faith, is *prima facie* fraudulent and void; and whenever the question is properly raised must be so declared, unless it is shown by competent evidence that it was

 Peckinbaugh v. Quillin.

"really made in good faith, and without any intent to defraud such creditors or purchasers." *Pyle v. Warren*, 2 Neb., 241. By the term "creditors" in this section is not included all persons to whom the mortgagor may happen to be indebted at any time, but only those who are his creditors whilst the mortgaged property is "in his possession, or under his control." Sec. 12 of the chapter on frauds, Comp. Stats., 288.

Section 20 of our statute of frauds provides that: "The question of fraudulent intent in all cases arising under the provisions of this chapter, shall be deemed a question of fact, and not of law," etc. Therefore, if the defendants wish to put in issue the *bona fides* of this mortgage, they must do so by suitable answers to the petition charging fraud directly, so that an issue may be formed, and the question submitted to a jury.

For these reasons the judgment must be reversed, the demurrer overruled, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

12	586
14	216
14	217
12	586
27	344
12	586
45	128

A. PECKINBAUGH, T. C. HOYT, AND GEORGE E. TAYLOR,
PLAINTIFFS IN ERROR, v. ALICE QUILLIN, DEFENDANT IN
ERROR.

1. **Mortgaged Chattels: CONVERSION: MORTGAGEE'S REMEDIES.** Where mortgaged chattels have been wrongfully seized and sold at the suit of a creditor of the mortgagor, the mortgagee has a choice of remedies: he may either replevy them, or recover their value at the time of the conversion in an action for damages.
2. ———: ———: **DAMAGES: EVIDENCE.** In an action for the recovery of damages for the conversion of chattels, the full market value is the measure, and this can be properly ascertained only by the testimony of witnesses possessed of sufficient

Peckinbaugh v. Quillin.

information to enable them to give intelligent opinions upon the subject.

3. ———: ———: **INTEREST OF MORTGAGOR: ATTACHMENT.** It is only when the mortgagor has a certain ascertained right of possession for a definite period, that he has an attachable interest in the goods.
4. ———: ———: **ATTORNEY LIABLE, WHEN.** When an attorney, in an attachment suit, in addition to his ordinary duties in suing out the writ, specially advises and directs the illegal seizure of property, and assists in its conversion by being present at the sale, and bidding of portions of it for his client, his liability is equal to that of the officer by whom the seizure and sale were made.

ERROR to the district court for Richardson county. On trial there before **WEAVER, J.**, Quillin had judgment, and defendant brought cause here for review on a petition in error.

T. C. Hoyt and *C. Gillespie*, for plaintiff in error.

A. Schoenheit and *E. W. Thomas*, for defendant in error.

LAKE, CH. J.

The petition states a good cause of action for the conversion of the property in question, and the several demurrers to it were properly overruled. No reason in support of either of said demurrers is given by counsel, and we will not discuss them. It is claimed that the court erred in striking out a part of the answer.

The action was brought to recover damages alleged to have been sustained by the plaintiff below as mortgagee of personal property, which the defendants below had converted to their own use. As to the fact of conversion it was answered, in substance, that the mortgage was fraudulent as to the creditors of John Quillin, the mortgagor, of whom the defendant Peckinbaugh was one. That the alleged conversion consisted merely of an attach-

Peckinbaugh v. Quillin.

ment and sale of the property in satisfaction of a debt due from said John Quillin to said Peckinbaugh, in which proceedings the defendants, Hoyt and Taylor, severally acted in the capacity of attorney and constable. It was also answered, in substance, and this is what was stricken out, that only the interest of the mortgagor was sold, and that the whereabouts of the property was well known to the plaintiff when she brought her action for the conversion. These averments were entirely immaterial. But even if they were material there would be no just ground of complaint, for the reason that substantially the same statements are made in the amended answer and there stand without objection. The theory of the plaintiffs in error upon this branch of the case seems to be that, because the property was still accessible to the mortgagee, and could have been replevied by her from the purchasers under the attachment sale, she was bound to pursue that course for redress. In this however we think they are mistaken. She had her election of remedies and could either replevy the property from the several purchasers, or recover its value in an action for the conversion. Jones on Chattel Mortgages, 556. *Eggleston v. Munday*, 4 Mich., 295. Our ruling upon this point is a sufficient answer to several other similar questions raised during the trial as to the admissibility of certain evidence, and upon the charge to the jury.

The claim of the plaintiffs in error that the mortgagor had an interest in the mortgaged property subject to sale on execution, and therefore attachable, cannot be sustained. In Jones on Chattel Mortgages, 556, it is said that: "It is only when the mortgagor has a certain ascertained right of possession for a definite period that an execution can be levied upon his interest. A mere equity of redemption, or a mere permissive possession, which the mortgagee may terminate at his pleasure, whenever he consider it necessary for his security, is not the sub-

Peckinbaugh v. Quillin.

ject of a levy and sale except by virtue of some statute. After default, when the mortgagee * * has the right to take possession and sell, the mortgagor's interest cannot be levied upon, * * there is not left in the mortgagor such a possessory right or interest as is capable of being seized and sold under execution against him; and the rule is the same although the mortgagor be allowed to remain in possession after the default, for in judgment of law he is in possession merely by sufferance, and as the bailee of the mortgagee. * * * If the mortgaged goods be attached, or seized upon execution while they are in the mortgagor's possession, the mortgagee may, whenever entitled to possession by the terms of the mortgage, recover possession from the officer, just as he might have recovered possession of the mortgagor if he had retained possession, or may sue him for the conversion." And in *Drake on Attachments*, sec. 539, the rule is stated thus: "The interest of a pledger or mortgagor is the mere equitable right of redemption by paying the debt or performing the engagement, for the payment or performance of which the property was pledged or mortgaged. Hence personalty so situated is not subject to sale under execution, and therefore not attachable."

The rule, thus stated, is entirely applicable to the mortgage in question, which was given in Brown county, Kansas, where the parties to it resided, and the property was by its terms required to be kept. Respecting the possession of the property it contained this provision, viz: "The property sold is to remain in possession of the party of the first part (the mortgagor), until default be made in the payment of the debt and interest aforesaid, or some part thereof; but in case of a sale or disposal, or attempt to sell or dispose of the same, or a removal of, or attempt to remove the same from said premises, or an unreasonable depreciation in the value, or if from any cause the security shall become inadequate, the said party of the

second part (the mortgagee), may take said property or any part thereof into her own possession," etc.

The testimony shows, and it is not disputed, that the mortgagor had removed that portion of the property here in controversy "from said premises" by bringing it into Richardson county, in this state, where it was attached as belonging to him. This gave to the mortgagee the right to the immediate possession, which was duly demanded, and of which the plaintiffs in error had notice before the sale under the attachment was made. Therefore, if the mortgage were not fraudulent as to the attachment plaintiff, and therefore void as to him, no attachable interest remained in the mortgagor, and the property was wrongfully converted. The question of the good faith of the parties to the mortgage was fairly submitted to the jury, and we see no reason for doubting the correctness of the conclusion reached that it was a valid security.

Another ground of alleged error is the refusal of the court to admit evidence as to what the property sold for under the attachment proceedings. It is claimed that what it brought at that sale was competent evidence of its real worth. This evidence was rightly excluded. The mortgagee was not a party to that sale, nor was she bound by it in any particular. It was shown very clearly that the mortgaged property, at the highest value put upon it by any witness, was insufficient to satisfy the debt it was given to secure. The measure of her damages therefore, in case she recovered, was its full market value at the time of the conversion, which could be properly ascertained only by the testimony of witnesses possessed of sufficient information to enable them to give intelligent opinions upon the subject. What the property may have brought at the attachment sale was not competent evidence of its value.

Finally it is contended that the court erred in holding the plaintiff in error, Hoyt, to be liable, inasmuch as "he only

Wertheim v. Altschuler.

acted as attorney for said Peckinbaugh," "and there is no evidence to justify a judgment against him." As to the evidence against Hoyt, we think it is ample to fix his liability. It is true he was the attorney for the plaintiff in the attachment suit, but in addition to the ordinary duties of attorney he took an active part in the conversion of the property by being present at the sale and bidding off at least a portion of it for his client, as is shown by his own testimony. There is also other testimony showing very clearly that it was by his advice and express direction that the constable insisted upon holding and selling the property after being advised of Mrs. Quillin's claim to it. Such being his relation to the transaction, the fact that he was an attorney will not shield him from equal liability with that of the officer to the owner of the property. We discover no material error in the matters complained of, and the judgment is affirmed.

JUDGMENT AFFIRMED.

**ALEXANDER WERTHEIM, PLAINTIFF IN ERROR, v. SOLOMON
ALTSCHULER ET AL, DEFENDANTS IN ERROR.**

1. **Malicious Prosecution: MALICE.** In an action to recover damages for a malicious prosecution, the jury may infer the existence of malice from the total want of probable cause for the prosecution.
2. **Practice: NON SUIT.** When upon every material issue there is evidence sufficient to support a verdict for the plaintiff, a non suit is improper. Evidence examined, and found to bring the case within this rule.

ERROR to the district court for Madison county. Tried below before BARNES, J.

James L. Brown and Robertson & Campbell, for plaintiff in error.

C. A. Baldwin, for defendant in error.

LAKE, CH. J.

This is a petition in error from Madison county, and the question to be answered is whether the plaintiff, on the trial of the action in the court below, was properly non-suited.

The action was brought to recover damages for an alleged malicious prosecution of the plaintiff by the defendants for the crime of forgery. The petition set forth properly the fact of the procuring of an indictment of the plaintiff by the defendants, and his subsequent trial and acquittal of the charge in Douglas county, and that, in what the defendants did, they acted maliciously and without probable cause.

The defendants admit in their answer that they were witnesses before the grand jury of Douglas county, and that it was upon their testimony that the indictment was found. They also admit that the plaintiff was tried and duly acquitted of the charge. The only material matters of the petition put in issue are the alleged want of probable cause, malice, and damages. The forgery charged against the plaintiff, and for which he was indicted, was of a receipt, of which the following is a copy:

"Omaha, Neb. Received of Alexander Wertheim, in full, of furniture by me to him sold, on and before this date, eighty-six dollars. S. Altschuler by Mari Altschuler, Nov. 7th, 1874."

Upon the issues thus formed, the plaintiff on the trial proved very conclusively, we think, that this prosecution was commenced and carried forward at the instigation of the defendants, or at least of one of them, viz: Solomon Altschuler. And he introduced testimony tending very strongly to prove that this was done both without any probable cause, and maliciously. For instance, the plaintiff, who was a witness in his own behalf, testified

that the receipt in question was executed, as it purports to have been, by Mrs. Altschuler herself, at or about the time of its date, and for the purpose which it expresses. That Mrs. Altschuler is his sister, with whose handwriting he is well acquainted, and that he knows the signature to be hers. And in this the plaintiff is fully corroborated by his wife, who testifies that she accompanied Mrs. Altschuler to the office of Mr. Sedgwick, an attorney, who wrote the body of the receipt, which Mrs. Altschuler there signed and immediately went to the plaintiff and handed it to him, saying as she did so, "Here, Alex., this makes us all right." And both of these witnesses testify that they had divers conversations with Solomon Altschuler before the commencement of the criminal prosecution, in which he said of the receipt, that "It was all right;" that the money which it represented, his wife "had given up to him," etc. This testimony would certainly have warranted the jury in finding that the defendants were without probable cause in this prosecution.

On the question of malice, there was considerable direct testimony. The witness, W. H. Harris, testified that he had conversations with Solomon Altschuler about the time of the commencement of the prosecution, in which he said "he would have him (Wertheim) put in the lock-up, or something of that kind, for forgery. I think it was for forging a receipt." And another witness, E. O. Wellberger, heard Altschuler say "when he came back from Omaha where he had him (Wertheim) indicted," "that he had him indicted and where he wanted him." Also Charles Wellberger, in answer to a question as to what he had heard Solomon Altschuler say about the prosecution; "He said Mr. Wertheim was indicted in Omaha, and he had him now where it would cost him something to get through." There was other testimony of like import, but this will suffice to show that Solomon Altschuler

was actuated by express malice in procuring the prosecution of the plaintiff. But even without this direct evidence of malice the jury would have been warranted in inferring it from the total want of probable cause, which was clearly established. 2 Greenleaf on Ev., sec. 453, note 1. *Turner v. O'Brien*, 5 Neb., 542.

We are of opinion that upon every material issue there was ample evidence to support a verdict in favor of the plaintiff. Such being the case, the motion for a nonsuit was improperly granted. The judgment, therefore, must be reversed, and a new trial ordered.

REVERSED AND REMANDED.

12	594
18	496
12	594
61	855

ABRAHAM RUTH, PLAINTIFF IN ERROR, V. ALFRED G. RUTH,
ET AL. DEFENDANTS IN ERROR.

Pleadings: Answer: DEMURRER. The true test of the sufficiency of an answer to a petition to withstand a general demurrer, is to enquire whether it will put the plaintiff to the proof of any one of the material averments of his petition. If it will it is good against such attack, and the demurrer should be overruled.

ERROR to the district court for Madison county. Heard below before BARNES, J.

Robertson & Campbell, for plaintiff in error.

Searles & Kelley, for defendants in error.

LAKE, CH. J.

The sole question in this case is whether the facts set forth in the answer constitute a defense to the petition.

The action was brought on a written contract, the substance of which is that in consideration of the conveyance by the plaintiff and his wife, Mary Ruth, (since

deceased) to the defendants of "all their right, title and interest in and to the following goods and chattels," viz: one span of mares and harness, one wagon, plow, harrow, and corn cultivator, three cows and sixteen hogs, together with their agreement that they would, when they obtained the title to a certain quarter section of land lying in Madison county, Nebraska, "execute a deed, and convey all their right, title and interest in and to the same" to the defendants, they, the defendants, would "maintain and support" the plaintiff and his said wife, "giving them all the necessities of life, (wearing apparel excepted,) including medical attendance in sickness," and at their death "a decent burial." This contract was executed on the 27th day of May, 1878, in Madison county, Nebraska, where all the parties to it then resided. The plaintiff alleges that he and Mary Ruth duly performed the contract on their part.

The sole breach on the part of the defendants complained of, and for which a recovery is sought, is set out in the petition in these words: "The plaintiff has been compelled to, and did pay out certain sums of money for the maintenance of himself and Mary Ruth, and for medicines and doctor's bills, and care of and funeral expenses for the said Mary Ruth, who has died since the making of the said contract and agreement. And the said plaintiff has paid, as aforesaid, the sum of two hundred and seventy-eight and 50-100 dollars, all of which was done at the special instance and request of the said defendants."

The petition does not directly charge the defendants with any refusal to furnish the plaintiff or his wife with all reasonable care and support in accordance with the terms of the contract, and were it not for the allegation that these expenditures of money were made "at the special instance and request of the defendants" there would be nothing to indicate that they were not entirely voluntary

and unnecessary. If they were voluntary and unnecessary of course the defendants cannot be required to repay them.

For answer the defendants say: *First*, That "they deny each and every allegation contained in said petition not herein specifically admitted." The only admission is the making of the contract as alleged in the petition. This put in issue the following of the plaintiff's material averments: 1st. That he "and Mary Ruth duly performed all of the conditions contained in the said contract" * * * "upon their part." 2nd. That the alleged payments of money were made. 3rd. That the defendants requested the payments to be made. With this answer on file, the plaintiff, in order to recover, would have to introduce satisfactory evidence on all of these points. The true test of the sufficiency of an answer to a petition to withstand a general demurrer, is to ascertain whether it will put the plaintiff to the proof of any one of the material averments of his petition. If it will, it is good against such attack, and the demurrer should be overruled.

But this answer goes still further and charges specifically that the plaintiff and his wife not only have not conveyed the land in question, but that by their abandonment of it (it being a government homestead) have forever put it out of their power to do so. Inasmuch as the answer put in issue material averments of the petition, the demurrer to it was properly overruled.

JUDGMENT AFFIRMED.

BENEDIOT DUNBLER, PLAINTIFF IN ERROR, v. ALEXANDER P. DAY, DEFENDANT IN ERROR.

1. **Verdict: DISREGARD OF EVIDENCE BY JURY.** When it is clear that material testimony has been disregarded by the jury.

12	596
13	817
20	246
23	826
12	596
28	247
12	596
30	41
12	596
36	657
12	596
39	82
12	596
46	706
12	596
56	194
12	596
60	545

and which if considered and given due weight, would require a different verdict from that returned, a new trial will be granted.

2. **Incompetent evidence.** The admission of incompetent evidence, if it have a tendency to prejudice the party excepting to it, is good ground for a new trial.
3. ———: **GOOD CHARACTER.** In a civil action against an innkeeper by a guest for the recovery of damages occasioned by a loss of goods, evidence of the defendant's good character for honesty is not admissible.
4. **Objection to testimony: EXCEPTION.** Where illegal testimony is admitted over objection, to make the objection available on a proceeding in error, an exception to the ruling must be taken.
5. ———: **OBJECTION MUST BE SPECIFIC.** Where to a question put to a witness as to whether he were "acquainted with the general reputation" of the defendant "for honesty," etc., this objection was made—"Plaintiff objects as before," and no previous objection had been made during the examination of this witness, although there had been many, and for various reasons, during the examination of others, *held*, that the objection was bad for indefiniteness.
6. **Instruction to jury.** If an instruction to a jury, on the subject of plaintiff's contributory negligence in the loss of goods at an inn, mention as evidence of such negligence matters that are not so, it is prejudicial error.
7. ———. Three credible witnesses, whose testimony on the point was uncontradicted, having sworn positively and particularly to a fact about which they could not have been mistaken, and the judge, in his charge to the jury, having suggested that there might be serious doubt on the subject, and that they might find the evidence "evenly balanced," *held*, erroneous.
8. ———. And if, by an instruction, a question material to the issue and without any evidence to support it, be submitted to the jury, it is error.
9. ———. Where material facts alleged in the petition stand admitted by the answer, the plaintiff has the right to have the jury so instructed, and told that such facts must be taken as true.
10. **Innkeeper: HIS DUTY AND RESPONSIBILITY.** An innkeeper is bound to take all possible care for the safety and security of the goods, money, etc., of his guests while in his house. And if the goods, or money, of a guest be stolen from the inn, through no fault or neglect of the guest, nor by a companion guest, and

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there is no evidence to show how it was done, or by whom, the innkeeper is liable for the loss.

ERROR to the district court for Butler county. Tried below before Post, J.

M. H. Sessions, for plaintiff in error.

Robbarts & Steele and *Whitmoyer, Gerrard & Post*, for defendant in error.

LAKE, CH. J.

This is a petition in error from Butler county. In addition to the general verdict for the defendant there were two special findings of fact in his favor upon questions put to the jury by the court. These questions were: "1st. Did plaintiff Dunbier take into the hotel of defendant the sum of \$1,650.00 or more? 2nd. Was the plaintiff's money, or any portion of the same, stolen from him, while a guest in the defendant's house?" The answer given to each of these questions was "No."

On behalf of the plaintiff it is claimed that these answers are unsupported by the evidence, and we think the claim is well founded. Indeed, upon a careful reading of the entire testimony submitted to the jury, we fail to discover the least particle of support for them. That the sum of \$1,650.00 was stolen from the plaintiff during the night that he was a guest at the defendant's hotel is placed by the evidence beyond all reasonable doubt, if any reliance can be put upon undisputed human testimony. The plaintiff, his wife, and daughter unite in saying that he had this sum in fifty and one hundred dollar bills, in a portemonnaie by itself; that he and his daughter, in his wife's presence, counted it while seated at the supper table, on the evening of their arrival at the defendant's house, at which time the daughter gave him a one hundred dollar bill of her own which went to make up the amount. Immediately after this the plaintiff retired for

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the night, and he swears positively to the fact that the money, which was in a side pocket of his coat on a chair when he went to bed, the next morning when he awoke was gone, that it had been taken by some one unknown to him while he was asleep.

Against this positive testimony of these witnesses there is nothing whatever opposed, save the fact that the defendant and some domestics who say they were "in and out of the dining room" while the plaintiff and his family were at supper, and did not see them count the money. This, however, is negative testimony, and while it may be entirely truthful, for the reason that neither of these witnesses was in the room during the entire time, does not, as we think, in the least degree shake the positive testimony of the plaintiff and his witnesses to the fact that the money was there counted precisely as they state. There must have been a total disregard of the testimony of the plaintiff, and of his wife and daughter, which was unwarranted by anything appearing in the record, or the jury could not have answered these questions as they did. And where it is clear that this has been done, it is good ground for a new trial.

Opposed to the claim of the plaintiff that his money was stolen from him at the defendant's house, the theory was advanced before the jury that the loss occurred in the railway coach, while on his way from Omaha to Rising, where the defendant lived. To establish this theory the defendant was permitted to introduce over the plaintiff's objection this testimony of the witness Turpin relative to searching the train on its return the next morning for the missing money.

Q. What, if anything, do you know about any one being sent down to search the train for the money the next morning?

Plaintiff objects as improper and immaterial in this case. Overruled and plaintiff excepts.

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A. I know it was talked there about the time that the train came in, that it was possible the pocket book might have been lost on the train.

Q. Was this talk in the presence of Dunbier?

A. Yes, sir.

Q. State if Dunbier, through his interpreter, requested any one to search the train for that pocket book?

A. Not that I heard.

This testimony relative to the possibility of the loss having occurred on the train was wholly incompetent. The plaintiff had suggested no such thing, nor had he authorized any one to suggest it for him. His contention, which was in the German language, he neither speaking nor understanding English, constantly was that the money had been stolen from his pocket during the night, and even if other persons did suggest or claim that he had lost it elsewhere, he was not bound by it, and what they said in that respect ought not to have been used to his prejudice, as was done. The admission of this evidence is another good ground for a new trial.

It is also objected to the ruling of the court during the trial that the defendant was permitted to introduce evidence of his good character for honesty. Several witnesses were permitted to testify, against objections on the ground of incompetency, that they were acquainted with his reputation in this respect, and that it was good. In this it is clear that the court erred. The reported cases are substantially unanimous in holding that this sort of evidence is confined to criminal prosecutions and to civil cases where the nature of the action involves the general character of the party, or goes directly to affect it. "The character of the parties to a civil suit affords, in general, such a weak and vague inference as to the truth of points in issue between them, that it is not usual to admit evidence of this description." Phillips on Evidence, Cowen & Hill's and Edwards' Notes, 757, (4th ed)

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In *Gough v. St. Johns*, 16 Wend., 645, overruling *Ruan v. Perry*, 3 Caines, 120, Cowen J., in speaking of the admissibility of the defendant's good character said: "Such evidence is in general confined to criminal prosecutions involving moral turpitude. * * * I mean to be understood as speaking of the general distinction. I know there are exceptions. They lie in that class of actions, or rather of issues, where general character is drawn in question by the pleadings or the points involved in a cause." And after instancing certain actions wherein it is admissible, adds: "But where a civil action is brought for an injury to property, though the injury was legally criminal, and involved moral turpitude, insomuch that on an indictment, evidence of character would be obviously receivable, there is no authoritative case except *Ruan v. Perry*, which favors its admissibility." On this point see also *Morris v. Hazelwood*, 1 Bush., 208. *Porter v. Seiler*, 23 Penn. St., 424. *Humphrey v. Humphrey*, 7 Conn., 116. *Boardman v. Woodman*, 47 N. H., 120. *Thayer v. Boyle*, 30 Me., 175. *Gutzwiller v. Lackman*, 23 Mo., 168. 1 Greenleaf on Evidence, Sec. 54. This therefore being merely a civil action for the recovery of a money judgment whereby there is imputed to the defendant, at most, only a want of due care for the safety of his guest's property, his character for honesty being in no way necessarily involved, according to the well settled rule of these authorities, and numerous others cited by counsel, it should have been kept out of the case.

But counsel for the defendant in their brief assert that the record "fails to show any exception on this point which will be considered by this court." And this is, we think, correct. As to the witness Inglehart, no exception appears to have been taken to the overruling of the objection to the admission of this testimony. For aught that appears in the bill of exceptions counsel was entirely content with the ruling against them. To make an objection

to the admission of illegal testimony available on a proceeding in error an exception to the ruling must be taken. And it must be taken at the time the decision is made. Civil Code, 308. But as to the witness Cook, an exception appears to have been duly taken to the ruling complained of, and the question raised by counsel for the defendant is whether the objection was sufficiently specific. The record shows the examination of this witness on the question of character to have been as follows:

Q. Are you acquainted with the defendant?

A. I am.

Q. How long have you known him?

A. About nine years.

Q. Are you acquainted with his general reputation for honesty in the neighborhood in which he resides?

Plaintiff objects as before. Overruled and plaintiff excepts.

A. Yes, sir.

Q. Is that good or bad?

A. It is good.

To what counsel referred to by the objection "as before" there is no means of knowing; it is a matter of mere conjecture. The reference certainly could not have been made to an objection to anything that had occurred in the previous examination of this witness, for none had been made. If it were to an objection to something asked of another, the trouble is that the previous objections are so numerous and various that no one can possibly tell which one the objector had in view. But in this matter, counsel for plaintiff are at fault in still another particular. Even if the objection were specific enough, the inquiry objected to being merely preliminary, with the view of ascertaining whether the witness were competent to answer as to the defendant's character, and the next and vital question, as to whether his reputation for honesty were "good or bad" having been put and answered without objection,

the error would have been without prejudice and not a ground for a new trial. It was of no use to object to this preliminary question, if the succeeding and principal inquiry were to pass unquestioned. For these reasons, if the only error complained of were the admission of testimony as to the defendant's reputation for honesty, although such testimony was wholly immaterial to the issues being tried, the judgment would not be disturbed.

The only remaining grounds of alleged error to be examined relate to certain of the instructions given to the jury, and to others that were requested, but refused. The second instruction was excepted to. It was in these words:

"A guest cannot recover against an innkeeper for the loss of his goods when his own negligence has contributed to such loss. Slight omissions of care on the part of the plaintiff will not prevent his recovery. And in determining whether the plaintiff, Dunbier, by his own negligent acts, has contributed to the loss, you should carefully consider all the facts and circumstances of the case, his age, the amount of money, the manner in which he says he carried it, in the opening of such money in the depot in Council Bluffs, the fact (if it be a fact) that it was opened and counted in the dining room of defendant's hotel, the chances for being observed by designing parties from within or through the windows of such dining room, the fact that the plaintiff retired, leaving his door unlocked, if there was a bolt or lock on the door of his sleeping room; these, together with all other facts and circumstances, should be considered by you."

The concluding clause of this instruction certainly gave to the jury an exceedingly wide range to search for proof of negligence on the part of the plaintiff. "All other facts and circumstances" is rather too indefinite as a guide to a jury upon a question of this sort. Besides, of this entire recital of facts which the jury were

specially directed to, the only one from which the least degree of negligence could be imputed to the plaintiff, was the leaving of his bed room door unlocked. And even this neglect the jury were properly told in this immediate connection "would not necessarily constitute such negligence" as would prevent a recovery. And certainly neither the plaintiff's age, the amount of the money, nor the manner in which he carried it, was evidence of contributory negligence to the loss at the defendant's inn. Neither was the opening of his portemonnaie at Council Bluffs, on the day preceding the loss, when he had occasion to take out some money for the payment of his fare from Omaha to the end of his journey. And the same is true of the fact of his counting his money in the dining room of the defendant's house. There is nothing in either, or all of these facts combined, that would relieve the defendant in any degree from the obligation which the law put upon him as an innkeeper to observe the utmost care for the security of the plaintiff's property, or money which he had with him while at his house. This instruction must have caused the jury to consider as evidence of negligence on the part of the plaintiff matters that were not so. It was therefore prejudicial to him, and good cause for a reversal of the judgment.

The third instruction was, we think, also erroneous in this. After informing the jury that, as to the fact of the money in question having been taken into the hotel, the burden of proof was on the plaintiff, and that it must be established by a preponderance of evidence, it proceeds thus: "If he has failed to produce such preponderance, or if the evidence is evenly balanced, you should find for the defendant without considering the other questions in the case."

As we have already shown, the evidence that the money was taken into the house was conclusive, with

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really nothing opposed to it. Three credible witnesses, whose testimony on this point stands practically undisputed, swore positively and particularly to the fact. It was a matter about which they could not have been mistaken. Under these circumstances to suggest to the jury that there was serious doubt on the subject, or that they might find the evidence "evenly balanced," was error.

The fourth instruction was excepted to. It was as follows :

"If you find that the defendant, as proprietor or keeper of said hotel, was not guilty of any neglect or want of care in providing for the comfort of his guests, and the safety and security of their property, but on the contrary he had taken all the care, pains, and precaution which a careful, prudent, and conscientious man could have taken under like circumstances for the safe keeping of the property of his guests; and if the plaintiff's money was lost in defendant's hotel without any negligence or fraud on the part of the said defendant, or any of his family, or any of his servants, the law will not hold him liable for said loss."

This instruction is obviously objectionable. It is wanting in precision as to the degree of care and responsibility which the law imposes upon an innkeeper for the safety of his guest's property. Just what exemption from that extreme care which, according to the great weight of authority, the law does exact, was intended by the phrase "under like circumstances," or how the jury understood it, we have no means of knowing. Certain it is however that there is nothing in the record which could properly be held to relieve the defendant from the utmost care which the law would impose upon an innkeeper in any case.

"Innkeepers," says Kent, in his Commentaries, Vol. 2, *592, "are held responsible to as strict and severe an extent as common carriers. * * The responsibility of

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an innkeeper for the horse or goods of his guest whom he receives and accommodates for hire, has been a point of much discussion in the books. In general he is responsible at common law for the acts of his domestics, and for thefts, and is bound to take all due care of the goods and baggage of his guests deposited in his house, or intrusted to the care of his family or servants, without subtraction or loss, day and night."

And Mr. Redfield, in his work on Carriers and other Bailees, 458, *et seq.*, in speaking upon this subject, says: "We should now state the rule of law in regard to the extent of the innkeeper's responsibility to be, that he is presumptively responsible for all injuries happening to the goods of his guests, and by them entrusted to his care; and that he cannot exonerate himself except by showing that he did all to insure their safety, which it was in his power to do, and that no default is attributable to his servants or guests." And on page 464: "It seems to be the fair result of all the cases that the innkeeper is responsible for all the property of every kind which the traveller finds it convenient to have about him as a traveller,"

In *Houser v. Tulley*, 62 Penn. State 92, this language is used: "He," the innkeeper "is bound to take all possible care of the goods, money, and baggage of his guests, deposited in his house, or entrusted to the care of his family or servants; and he is responsible for their acts, as well as for the acts of other guests. If the goods of the guests are damaged in the inn, or are stolen from it by the servants, or domestics, or by a stranger guest, he is bound to make restitution; for it is his duty to provide honest servants, and to exercise an exact vigilance over all persons coming into his house, as guests or otherwise. His responsibility extends to all his servants and domestics, and to all the moneys of his guests which are placed within the inn; and he is bound in every event

to pay for them if stolen, unless they were stolen by a servant or companion of the guest." 1 Am. Repts., 390. And by the better authorities such seems to be the extent of the rule where the goods are stolen from the inn, and, as in this case, there is no evidence to show how it was done, or by whom; the only exceptions being those losses arising from the negligence of the guest himself, the act of a companion guest, or superior, or, as many of the cases put it, "irresistible force." Redfield on Carriers and other Bailees, sec. 596. See also *Pinkerton v. Woodard*, 33 Cal., 557. *Sibley v. Aldrich*, 33 N.H., 558. *Shaw v. Berry*, 31 Me., 478. *McDaniels v. Robinson*, 26 Vt., 316. *Piper v. Manny*, 21 Wend., 282. *Howth v. Franklin*, 20 Tex., 798. *Johnson v. Richardson*, 17 Ill., 302. *Mason v. Thompson*, 9 Pick., 280. And when the fact of the loss having occurred within the inn is established, which devolves upon the guest, the burden of showing it to be within one of these exceptions rests upon the innkeeper. *Norcross v. Norcross*, 53 Me., 163. The last clause of this instruction is also open to the objection that it may be taken as relieving the defendant from responsibility for the acts of his other stranger guests.

Another of the instructions complained of was clearly wrong, for the reason that there was not a particle of evidence to which it could apply. As an abstract proposition of law however it was correct. This instruction was the sixth, by which the jury were told that if they found the money to have been stolen "by plaintiff's own friend and traveling companion," then they should find for the defendant. There being nothing before the jury to warrant a finding that the money was stolen "by the plaintiff's own friend and traveling companion," the direct and only effect of this instruction was to mislead them to his prejudice. *Meredith v. Kennard*, 1 Neb., 312. *Meyer v. Midland Pac. R. R. Co.*, 2 Id., 319. *Curry v. State*, 4 Id., 545. *High v. Merchants Bank*, 6 Id., 155.

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Williams v. State, Id., 334. *Walrath v. State*, 8 Id., 80. *Cropsey v. Averill*, Id., 151. *Uhl v. Robinson*, Id., 272. *Newton Wagon Co. v. Diers*, 10 Id., 284. *Crete v. Childs*, 11 Id., 252. *Sheldon v. Williams*, Id., 272.

On behalf of the plaintiff the court was requested to give several instructions which were rejected. In this it is claimed there was error. What we have already said as to the duties and responsibilities of innkeepers, renders it unnecessary for us here to notice any of these requests save the first. By this one the court was requested to say to the jury that: "It is admitted by the pleadings in this case that the defendant is an innkeeper, and that the plaintiff was a guest at his inn on the night in question. It is not claimed by the defendant that he had in his inn an iron safe, as is provided by statute that he may, and thereby relieve himself from the common law liability of an innkeeper. That being the case, his liability is to be governed and controlled by that law."

Where material facts alleged in a petition stand admitted by the answer, it is a right of the plaintiff to have the jury so told, and further that such facts must be taken as being true. That the relation of innkeeper and guest existed at the time in question between the plaintiff and defendant was by the pleadings an established fact which the judge had not charged. As to the rule of defendant's liability, that was correctly stated to be as fixed by the common law, he not having relieved himself from its full operation as he might have done in a measure by furnishing his inn with an iron safe, as the statute provides. We think this request should have been complied with.

For these reasons the judgment must be reversed, and the new trial awarded.

REVERSED AND REMANDED.

THEODORE UHLING, GUARDIAN, APPELLEE, v. ANNA D.
SCHELLENBERG, APPELLANT.

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15	645
12	609
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1. Bill of exceptions. The same procedure is to be observed in preparing a bill of exceptions in an equity case, as in an action at law.
2. ———. Where a bill of exceptions was signed without being submitted to adverse party for examination and amendment, a motion to quash the same was sustained.

MOTION to quash bill of exceptions.

W. H. Munger, for the motion.

N. H. Bell, contra.

BY THE COURT.

A decree in this case was rendered in the district court of Dodge county in October, 1881, and the court adjourned *sine die* on the 19th of that month. No order extending the time to prepare a bill of exceptions was made in the case, but the appellant had a bill prepared, and, without submitting the same to the appellee or his attorney for amendment, procured the signature of the judge before whom the case was tried to the same, and on the 3rd day of January, 1882, filed said bill in this court. The appellee now moves to strike the bill of exceptions from the files. *First*. Because it was not submitted to the appellee or his attorney before being presented to the judge for allowance. *Second*. Because the bill was not presented to such judge for allowance within the time provided by law.

Sec. 676 of the code (Comp. Stats., 620), in relation to appeals, provides that: "In actions hereinafter heard and determined, when the proofs and testimony are taken orally before the court on the hearing of the case, the same shall be reduced to writing in form similar to bills

of exceptions, and be allowed by the judge hearing the cause, as in cases at law."

In equity cases the party excepting must reduce his exceptions to writing, within the time limited by statute or the order of the court, and submit the same to the adverse party or his attorney of record, for examination and amendment, if desired. The same procedure is to be had as in actions at law. It was the duty of the appellant therefore, to submit the bill of exceptions to the appellee before presenting the same to the judge for allowance. The object is to obtain an accurate bill. The statute prescribes the mode of procedure in settling the bill, and this must substantially be complied with. Unless the bill has been submitted to the adverse party for examination and amendment, the judge has no authority to sign the same. The motion to quash is sustained.

MOTION SUSTAINED.

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WILLIAM YOUNG & Co., PLAINTIFFS IN ERROR, v. COOPER & Co., DEFENDANTS IN ERROR.

Attachment: FRAUD. One C., a member of the firm of C. & Co., went to Chicago and arranged with Y. & Co., to purchase stock for them and draw on them for the necessary advances. C. then returned to this state, drew a draft on Y. & Co. for \$2,000.00, and wrote to them that he had purchased 125 hogs and would have 200 by Saturday night. Upon these representations the draft was paid. C. & Co. then sold the hogs to other parties. *Held*, That an attachment against the property of C. & Co., upon the ground that the debt was fraudulently contracted, would be sustained.

ERROR to the district court for Lancaster county.
Tried below before Pound, J.

Field & Holmes, for plaintiffs in error.

Courtney & Caldwell, for defendants in error.

MAXWELL, J.

In August, 1879, the plaintiffs commenced an action against the defendants in the district court of Lancaster county, to recover the sum of \$2,246.20, and caused an attachment to be issued and levied upon their property, the grounds for the attachment being that the "defendants fraudulently contracted the said debt, and fraudulently incurred the obligation for which suit has been brought." The attachment was dissolved in the court below on the motion of the defendants and the attached property discharged. The cause of complaint in this court is error in dissolving the attachment.

The affidavit of Albert D. Pickering used on the hearing below shows the following facts: "That he is one of the above named plaintiffs and a member of the firm of Wm. Young & Co., doing a general commission business in the city of Chicago, and state of Illinois; that for a long time, to-wit: from the 27th day of January, 1881, to the 28th day of July, 1881, said plaintiffs were doing a general and continuous business with said defendants, by advancing money for the purpose of enabling said defendants to purchase live stock and ship the same to plaintiffs in the city of Chicago, to be sold upon commission as is agreed and more particularly admitted by said defendants in affidavits filed herein; that there had been a running account between plaintiffs and defendants during said time; that the greater portion of the business as carried on between plaintiffs and defendants as aforesaid was carried on by one Wm. H. Sibley, agent of said plaintiffs, who resided in the city of Lincoln, in the state of Nebraska. That on or about the 17th day of June, 1881, the said defendant, Willard Cooper, called upon the affiant in the city of Chicago, and examined the running account as aforesaid, and then found and agreed with this affiant, that there was a small balance due and owing

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from said plaintiffs to these defendants, and affiant further says, that the said Cooper, then at the time aforesaid, told this plaintiff, that the said agent, Sibley, would not advance to them, the said defendants, sufficient money to enable them to carry on their business as general stock dealers in the county of Lancaster, state of Nebraska, but that they could do a much larger business provided said plaintiffs would advance to them, the said defendants, money in much larger sums, and the said Cooper then informed the said plaintiffs that on account of existing troubles between said defendants and said agent, Sibley, they could not continue their said business unless the said defendants could deal directly and exclusively with said plaintiffs, and said Cooper further informed this affiant that they desired to commence a new account with these plaintiffs, to settle and adjust the balance as due, and to then commence a new account. Relying upon these false and fraudulent representations, this affiant agreed with said defendant Cooper that such arrangements should be made; that said Cooper further informed this affiant at the time and place aforesaid, that he was going home, and that they, the said defendants, would commence the purchase of hogs and other stock, and that all of said stock they would ship to these plaintiffs, and draw drafts on these plaintiffs for the payment of the same, and it was agreed by and between this plaintiff and said Cooper that upon receipt of a letter accompanying any of said drafts that they, the said defendants, had stock ready or about to be shipped, or had been shipped to these plaintiffs, that plaintiffs would pay said drafts. Affiant further says, that on the 21st day of June, A. D. 1881, the said defendant, Cooper, informed these plaintiffs, that said defendants had purchased a lot of one hundred and twenty-five hogs, and that said defendants would have two hundred hogs at the end of the same week, and that they had drawn upon said plaintiffs a draft for the sum of two-

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thousand dollars. And affiant says, that relying upon the agreement of said defendants as aforesaid, and upon the representations of said defendants, and believing the same were true, and that said defendants would ship said stock to these plaintiffs, said plaintiffs paid the draft, and advanced the said defendants the sum of two thousand dollars. That said defendants, wholly disregarding the representations and agreements as aforesaid, to and with this affiant, fraudulently, corruptly, and with intent to defraud and cheat the said plaintiffs, did sell and dispose of said stock to other persons than said plaintiffs. That said defendants from that time have not shipped to these plaintiffs any stock whatever, but have refused to deal further with plaintiffs, and have refused plaintiffs' repeated requests for a settlement and adjustment of their said account," etc.

Mr. Pickering is corroborated by the affidavit of W. C. Fulton, his clerk, and also by W. H. Sibley. At the time Cooper & Co. drew the draft in question, they sent to the plaintiffs a letter, of which the following is a copy :

BENNETT, 6—21, 1881.

Wm. Young & Co. Dear Sir : Have made draft on you for two thousand dollars. We have one hundred and twenty-five hogs bought, will have two hundred by Saturday. Lots of hogs for sale now. Are paying \$4.60—75 for good ones.

Yours,

WILLARD COOPER.

Four days thereafter and after the draft in question had been sent, and probably paid, the defendants sent the following letter to the plaintiffs :

BENNETT, 6—25, 1881.

Wm. Young & Co. Gentlemen : I have sold the hogs for this week and will have two cars of cattle the 1st day of July, and three cars of hogs. Send me statement of our account. Will see Sibley then immediately and fix our matters all up, and pay balance due you, then when we

Young v. Cooper.

ship the stock, take a new start entirely. When we ship will notify you and will not want to draw any more than the stock comes to. Want to keep balance in my favor.

Yours truly,

COOPER & Co., per C.

E. A. Kilborn, one of the defendants, filed an affidavit in the case, in which he states that the entire amount of the defendants' transactions with Young & Co. amount to \$69,000.00, and that the action is brought for a pretended balance, and that the defendants are not indebted to the plaintiffs in any sum whatever.

The defendant, Cooper, filed three affidavits made by himself. In the first he alleges that the defendants are solvent, denies that the debt was fraudulently contracted, and alleges that he had, previous to the commencement of the action, offered to pay the plaintiffs any balance due them. In the second he denies that he is indebted to the plaintiffs in any sum whatever, but alleges that the "plaintiffs were to aid and furnish this affiant with money to buy stock; * * * that he is a local stock dealer in Lancaster county, and as such, in pursuance of the aforesaid agreement and its further provisions, did ship to said plaintiffs stock as aforesaid, and that he was, in pursuance of said agreement, given credit to the amount of the sales of stock shipped plaintiffs an account for moneys advanced as aforesaid," etc. It is also stated, there is a balance due the defendant from the plaintiffs of the sum of \$1,800.00, and he again denies that he has committed any fraudulent act. In the third he states that the \$2,000.00 paid on the draft in question was received on the old arrangement, and that the only change made was to deal directly with the plaintiffs, and not through W. H. Sibley. He also states that at the date of the draft in controversy the defendants had purchased and paid for the hogs mentioned in his letter with their own money. There is an entire failure however either to deny

or explain the grounds upon which the plaintiffs base their right to an attachment. It does appear however, from the affidavits in the case, that the defendants had transacted their business through W. H. Sibley, an agent of plaintiffs residing at Lincoln, until about the 17th day of June, 1881, but that they were unable to obtain advances from Sibley, unless they had sufficient stock on hand to make the same secure. The defendant, Cooper, then was anxious to make an arrangement with the plaintiffs to ship direct to them without the intervention of an agent, and draw on them for the necessary advances. This arrangement was made on the 17th day of June, and in pursuance of the arrangement made by Cooper with the plaintiffs he returned to this state, and on the 21st of June of that year, drew on them for \$2,000.00, and at the same time wrote a letter representing that he had already purchased 125 hogs, and that he would have 200 by Saturday. If we leave out all that portion of the letter as to the number he expected to purchase, as being a mere expression of opinion, still the representation remains as to the 125 which he claimed to have purchased. As to this number he evidently intended that the plaintiffs should understand that they had been purchased for them, and the very object of the letter in question, in view of the previous arrangement, was to assure them that the purchase was made for them. This representation was made as to existing facts, and for the purpose of inducing the plaintiffs to pay his draft, which, relying upon his representations, they afterwards did. In his third affidavit filed in this case Cooper states in effect that he did not purchase the hogs in question for the plaintiffs, thus by his own evidence showing that the representations made by him to the plaintiffs were false. That the fraud thus practised was material there is no doubt, because without the representations as to the number of hogs purchased the draft would not have been paid. In the examination

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of the record in this case we have no doubt that there was a deliberate purpose on the part of Cooper to commit a fraud upon the plaintiffs, and that the visit to Chicago, and the arrangement to deal directly with them without the intervention of Sibley, was but part of the scheme which was consummated by drawing the draft in question, and making the false representations complained of.

"Where a party intentionally or by design misrepresents a material fact, or produces a false impression in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him, in every such case there is positive fraud in the truest sense of the terms. There is an evil act with an evil intent, *dolum malum ad circumveniendum*. And the misrepresentations may be as well by deeds or acts, as by words; by artifices to mislead, as well as by positive assertions." Story Eq., sec. 192.

The judgment of the district court is reversed, the attachment reinstated, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE STATE OF NEBRASKA, EX REL. J. C. CRAWFORD, v. J. EBERLY, COUNTY CLERK, STANTON COUNTY.

Garnishment. A county is not subject to process of garnishment.

ORDER to show cause why an attachment should not issue against respondents for contempt.

J. C. Crawford, the relator, *pro se*.

E. F. Gray, for the respondent.

MAXWELL, J.

In July, 1881, the relator applied to this court for a

writ of mandamus to compel the defendant, as county clerk of Stanton county, to deliver to him a county warrant for the sum of \$88.00, drawn in favor of Mary Horacek, but alleged to have been assigned to the relator. An alternative writ was granted, to which the defendant filed an answer stating in substance that he had been garnished as county clerk in an action pending in the district court of Stanton county, wherein D. Crowell was plaintiff, and Waclaw Horacek and others were defendants. The cause was continued from time to time, until November, 1881, when the defendant filed a supplemental answer setting forth in substance, that on the 16th day of November the above named cause came on for trial, and the court found that there was due from Waclaw Horacek to D. Crowell the sum of \$398.80, upon the cause of action set forth in the petition in that case; and found that the warrant in question was the property of Waclaw Horacek, and directed said defendant to deliver the same to the sheriff of said county, to be applied upon said judgment. A peremptory writ was awarded in this court requiring the defendant to deliver to the relator the warrant in question. The warrant not being delivered, an order was entered to require the defendant to show cause why an attachment should not be issued against him for contempt. In his answer to this order he states in substance that after the judgment against him as garnishee, requiring him to deliver the warrant in question to the sheriff of Stanton county, he delivered the same to said sheriff before the peremptory writ was served upon him, and he now tenders the face value of said warrant with interest thereon, if the court shall adjudge that he pay the same. He also states that he was served with notice of garnishment before the alternative writ of mandamus was allowed, and the record shows that such is the case. The question to be determined therefore is, is a county liable to process of garnishment?

In the case of *The People v. The Mayor of Omaha*, 2 Neb., 166, it was held that a municipal corporation was not liable in such case. Mason, Ch. J., who delivered the opinion of the court, says, (page 168): "The legislature did not contemplate the service of garnishee process upon municipal corporations, created exclusively for the purpose of government; and hence no provision was made for service upon them."

In the case of *Burnham v. Fond du Lac*, 15 Wis., 193, a majority of the court held that a municipal corporation was not liable in such case. Payne, J., says, (page 149): "The question is very similar in principle to that, whether sheriffs or clerks of other courts, and other similar officers, are liable to garnishment for moneys in their possession as such officers." And in the case of *Hill v. La Crosse & Mil. R. R. Co.*, 14 Wis., 291, the majority of the court held that the sheriff was not liable.

The following cases are very clear and satisfactory authorities against the liability of municipal corporations to garnishment. *Hawthorne v. The City of St. Louis*, 11 Mo., 59. *Fortune v. St. Louis*, 23 Id., 239. *Mayor, etc., of Mobile v. Rowland & Co.*, 26 Ala., 498, *Mayor, etc., of Baltimore v. Root*, 8 Md., 95. *Erie v. Knapp*, 29 Penn. St., 178.

In *Wales v. Muscatine*, 4 Iowa, 302, the court held that the words "debtor or person holding property" in the attachment act extended to municipal corporations, and that they were subject to garnishment; but the legislature amended the statute so as to provide that "a municipal corporation shall not be garnished."

In *Jenks v. Osceola Township*, 45 Iowa, 554, it was held that the rule, that municipal corporations shall not be garnished, is not limited to cases where it would interfere with the discharge of corporate duties, but is universal in its application.

In the case of *Wallace v. Lawyer*, 54 Ind., 501, the

court, after an elaborate review of the authorities, held in substance that neither a body politic and corporate nor its officers as such, are subject to garnishment. The opinion was delivered by Biddle, J., who says (page 508): "All the cases we have consulted upon these questions seem to rest their decisions upon a branch of the great public principle which exempts an ambassador, a foreign minister, charge d'affaires, consul, members of legislature or public functionaries, while in office and in the public service, from civil arrest or other legal embarrassment at the suit of a private party. Without such a rule it would be frequently in the power of an individual to endanger the public interests or even check the wheels of government. * * * * The exemption is not given to the persons for a private advantage, but granted to the office from public necessity."

In *School District v. Gage*, 39 Mich., 484, it was held that a school district is a municipal corporation and cannot be garnished even by its own consent, unless the debtor also consents. It is said (page 486): "There is no force to the waiver of objection to the jurisdiction. The exemption really belongs to the person whose debt is garnished and not to the debtor. *Johnson v. Dexter*, 38 Mich., 695. The garnishee cannot, without the debtor's consent, subject his rights to any unlawful burden."

In *Merwin v. The City of Chicago*, 45 Ill., 133, the court held that a municipal corporation was not liable to process of garnishment no matter what may be the character of its indebtedness. The opinion of the court was delivered by Lawrence, J., who says (page 136): "A municipal corporation cannot be properly turned into an instrument or agency for the collection of private debts. It exists simply for the public welfare, and cannot be required to consume the time of its officers or the money in its treasury in defending suits, in order that one private individual may better collect a demand due from another. A

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private corporation must assume the same duties and liabilities as individuals, since it is created for private purposes. But a municipal corporation is a part of the government. Its powers are held as a trust for the common good. It should be permitted to act only with reference to that object, and should not be subjected to duties, liabilities, or expenditures, merely to promote private interest or private convenience."

In *Millison v. Fisk*, 43 Id., 112, in which process of garnishment had been served upon the officers of a school district, it was held that such officers were not subject to garnishment. The opinion of the court was delivered by Walker, J., who, after citing a large number of cases, says: "From these cases, and other authorities which might be cited, we may deduce the rule, that a person deriving his authority from the law to receive or hold money or property, cannot be garnished for the same, when held by him under such authority."

And the rule was adhered to in *Bivins v. Harper*, 59 Id., 21.

In the case of *Chicago v. Hasley*, 25 Ill., 595, it is said: "All municipal corporations are both public and political bodies. They are the embodiment of so much political power, as may be adjudged necessary. * * * * * They cannot be said to possess property liable to execution, in the sense an individual owns property so subject, for they have control of the corporate property only for corporate purposes, and to be used and disposed of to promote such purposes, and such only. Levying on and selling such property and removing it, would work the most serious injury in any city." See also *Ripley v. Gage County*, 3 Neb., 397.

In *Stillman v. Isham*, 11 Conn., 123, it was held that public officers, having money in their hands to which certain parties are entitled, are not liable to the creditors of those individuals by process of foreign attachment, and

in *Ward v. The County of Hartford*, 12 Id., 404, it was held that a county was not liable in such case.

In the case of the *City of Newark v. Funk*, 15 Ohio State, 462, Funk brought an action against Brooks, the city marshal, and caused his salary to be garnished. The answer of the city admitted the indebtedness to Brooks, but alleged that the amount was due to him for salary as city marshal. The court held that the city was subject to garnishment. The opinion of the court was delivered by Welch, J., who says (page 463): "The 458th section of the code provides that an action like this may be brought to subject to the payment of a judgment, when there is not sufficient other property, "any claims, or choses in action due or to become due, to the judgment debtor, and all money, goods and effects, which he may have in the hands of any person, body politic or corporate." There is no discussion of the authorities nor examination of the principles involved in the decision. Undue prominence is also given to the words "any claims" and "any person," etc., but the impolicy of requiring a public corporation, created for purposes of government, to spend the money raised by taxation and the time of its officers in expensive and vexatious litigation, in which the corporation has no interest, is not discussed. It is assumed that the same principles govern individuals and public corporations. Sec. 532 of our code is substantially a copy of sec. 458 of the code of Ohio, but we cannot give our assent to the doctrine of *Newark v. Funk*, and, so far as our examination extends, we have found no case citing it with approval.

In the case of *The People v. The Mayor of Omaha*, it is said: "The legislature did not contemplate compelling this class of corporations to stand at the bar of the various courts of the state, and participate in controversies between debtors and creditors. The public interest might suffer while the municipal authorities would be compelled

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to occupy their time over contests in which the public had no interest." That language is as applicable to counties as to municipal corporations proper, and the rule that public corporations are not subject to garnishment applies to counties. *Wallace v. Lawyer*, 54 Ind., 501. *McDougal v. Hennepin Co.*, 4 Minn., 184.

The defendant does not seem to have called the attention of the district court to the contest to which he was a party, for the delivery of this county warrant, and his conduct to some extent has the appearance of collusion. But as he was not subject to process of garnishment it was his duty to deliver the warrant to the party entitled to the possession of the same. As he has disabled himself from performing this duty, by delivering such warrant to a party not entitled to it, he is required to pay to the clerk of this court for the use of the relator, within twenty days from the time of service of this opinion upon him, the value of such warrant, with interest from Nov. 16th, 1881, and to pay the ordinary costs of the action.

JUDGMENT ACCORDINGLY.

12	622
17	365
18	89
19	622
27	235
12	622
55	282

D. CROWELL, APPELLEE, v. WACLAW HORACEK, ET AL., APPELLANTS.

1. Appeal to supreme court. In an action to recover a money judgment the plaintiff alleged in his petition, that the debt was fraudulently contracted; that the defendant was insolvent, and in addition to the prayer for the amount due, sought to subject certain securities to the payment of his claim, and also prayed for an injunction. Held, That so far as the action was one in equity, an appeal to the supreme court would lie.
2. Injunction. A mere general creditor, who has not reduced his claim to judgment, cannot maintain an action to enjoin a debtor from transferring his property.

APPEAL from the district court of Stanton county.
Tried below before BARNES, J.

J. C. Crawford, for appellants.

E. F. Gray, for appellee.

MAXWELL, J.

On the 23rd of June, 1881, the plaintiff filed a petition against the defendants in the district court of Stanton county, in which he prayed for the following relief. *First.* For judgment against Waclaw Horacek, for the sum of \$865.00 with interest from the 15th day of December, 1880. *Second.* For an injunction to restrain Mary Horacek from receiving a county warrant of Stanton county, drawn in her favor for the sum of \$88.00. *Third.* To restrain J. Eberly, county clerk of said county, from delivering said warrant to said Mary Horacek or any other person for her; and that upon the final hearing said warrant may be declared to be the property of Waclaw Horacek, and be applied to the payment of the plaintiff's claim.

A temporary order of injunction was granted by the county judge of Stanton county, restraining "one F. Zander, from paying the amount due upon a certain promissory note against F. Zander, and in favor of said Waclaw Horacek, for \$100.00." Also enjoining "one McGivern from collecting and paying or delivering to said Waclaw Horacek * * * any money, credits, or property," etc. Also to enjoin Mary Horacek from receiving, or the county clerk from delivering to her, said county warrant for the sum of \$88.00. The injunction was dissolved on the 28th of July, 1881. Four days after the commencement of the action a motion was filed by the plaintiff to make F. Zander, F. McGivern, James Horacek, Sarah Horacek and Mary Horacek, parties defendant to the action, and praying for an injunction to restrain them from paying or receiving the money due upon the note and warrant heretofore described. What action, if any, was taken upon

this motion does not appear. In November, 1881, judgment was rendered against Waclaw Horacek, and in favor of the plaintiff, for the sum of \$398.80 and costs, and the court found that the defendants were guilty of the frauds charged in the petition, supplemental petition, and motion and affidavits for injunctions, and that the county warrant is still in the possession of J. Eberly, and was fraudulently caused to be drawn in favor of Mary Horacek, and directing the sheriff to endorse and receipt the warrant in the name of Mary Horacek, and enjoining Eberly from delivering said warrant to Mary Horacek, etc. The Horaceks appeal to this court. The plaintiff now moves to dismiss the appeal upon the ground that an appeal will not lie in such case—in other words, that this is an action at law.

The principal ground of relief sought in the petition is for an injunction, and as the appeal is from a decree of the district court making the injunction perpetual, the action to that extent at least is one in equity and is appealable. The motion must therefore be overruled.

II. The plaintiff in his petition, after setting forth the cause of action against Waclaw Horacek, states that for the purpose of defrauding his creditors, Horacek sold his personal property, including 12 road scrapers, afterwards sold to Stanton county, to his wife Mary Horacek; that he is wholly insolvent and has no means to pay the plaintiff's claim except such as may be derived from the sale of the personal property sought to be applied in this case; that on the 20th day of June, 1881, Mary Horacek sold and delivered twelve road scrapers to Stanton county; that the clerk of said county drew a warrant in favor of said Mary Horacek for the sum of \$88.00, which warrant was duly signed and sealed, and said clerk, unless restrained, will deliver said warrant to said Mary Horacek; that the plaintiff has no adequate remedy at law, etc. Does such a petition state any ground for equitable relief? We think not. A court of equity will not, at the suit of a mere

creditor, who has not reduced his claim to judgment, interfere by injunction to restrain a debtor from any disposition of his property which he may see fit to make.

In *Wiggings v. Armstrong*, 2 John, Ch., 144, Chancellor Kent says: "This is a case of a creditor on simple contract, after an action commenced at law, and before judgment, seeking to control the disposition of the property of his debtor, under judgments and executions, upon the ground of fraud. My first impression was in favor of the plaintiffs, but upon examination of the cases, I am satisfied that a creditor at large, and before judgment and execution, can not be entitled to the interference which has been granted in this case. In *Angell v. Draper*, (1 Vern., 399), and *Shirley v. Watts*, (3 Atk., 200), it was held, that the creditor must have completed his title at law, by judgment and execution, before he can question the disposition of the debtor's property; and in *Bennett v. Musgrave*, (2 Ves. 51), and in a case before Lord Nottingham, cited in *Balch v. Wastall*, (1 P. Wms., 445), the same doctrine was declared, and so it is understood by the elementary writers. (Mitford, 115. Cooper Eq. Pl., 149.) The reason of the rule seems to be, that until the creditor has established his title, he has no right to interfere, and it would lead to an unnecessary, and perhaps a fruitless and oppressive interruption of the exercise of the debtor's rights. Unless he has a certain claim upon the property of the debtor, he has no concern with his frauds. On the strength of settled authorities, I shall, accordingly, grant the motion for dissolving the injunction." See also *Wineland v. Cochran*, 9 Neb., 480. *Weil & Cahn v. Lankins*, 3 Neb., 384. *Holdredge v. Gwynne*, 3 C. E. Green, 26. *Young v. Frier*, 1 Stockt., 465. *Uhl v. Dillon*, 10 Md., 500. *Rich v. Levy*, 16 Md., 74. *Phelps v. Foster*, 18 Ill., 309. *Bigelow v. Andress*, 31 Ill., 322. *Rhodes v. Cousins*, 6 Rand., 188.

The petition fails to state facts sufficient to justify the

court in granting an injunction, and its decree granting the same is reversed, and the injunction dissolved. There seems to have been an attachment issued in the case, but the proceedings under the attachment are not before the court. The decree of the court below will be modified in conformity to this opinion.

JUDGMENT ACCORDINGLY.

12	626
13	906
13	267
13	459
12	696
25	617

WARREN E. CHESNEY, PLAINTIFF IN ERROR, v. ALSON FRANCISCO, DEFENDANT IN ERROR.

1. *Exemption.* One F., the head of a family, removed to this state with his family, with the intention of residing here; but a few days thereafter, and before he occupied a dwelling, his personal property was attached upon the ground that he was a non-resident. In an action of replevin to recover the property, *held*, that he was entitled to the benefit of the exemption law.
2. ———. Under our statute exempt property may be claimed at any time before it is sold.

ERROR to the district court for Saline county. Tried below before WEAVER, J.

Hastings & McGintie, for plaintiff in error.

Colby & Hazlett, for defendant in error.

MAXWELL, J.

In December, 1878, the defendant, who is the head of a family, removed to this state, and while stopping at the residence of his wife's father in Saline county, his personal property was levied upon under an order of attachment issued out of the county court of Saline county. The plaintiff herein is a constable, and levied the writ of attachment and took the property into his possession. The county court seems to have rendered judgment on

the attachment in favor of the defendant. The plaintiff in that action then appealed to the district court. The defendant herein thereupon commenced an action of replevin and recovered the possession of the property thus attached. On the trial of the suit in replevin the court found, "the value of all of said property at the time it was levied upon under the writ of attachment, and at the time it was replevied by the plaintiff, to be three hundred and fifty dollars, and that it was all the property owned by the plaintiff, and that plaintiff was and is the head of a family, and a *bona fide* resident of Saline county, Nebraska, and actually engaged in the business of agriculture, and the court further finds that the plaintiff was damaged by reason of the unlawful detention of the property in controversy by defendant, in the sum of five dollars, wherefore it is considered and adjudged by the court that plaintiff retain said property, and that he have and recover of and from the defendant the said sum of five dollars, his damages, and his costs herein, taxed at fifty-two dollars and thirty-three cents. The court further finds that at the time the property was attached the plaintiff did not claim the property as exempt, but did so before the sale of the same." The cause is brought into this court by petition in error.

It is said on behalf of the plaintiff in error, that the right of exemption is a personal right, which must be claimed. This is undoubtedly true as to such property as must be selected by the debtor or his agent. But under our exemption law exempt property may be claimed at any time before the sale. The statute provides that certain articles, among them a span of horses, harness, and wagon, "shall not be liable to attachment, execution, or sale on any final process issued from any court in the state against any party being a resident of the state and the head of a family." The testimony in this case shows that Francisco is the head of a family, and that he came

to this state for the purpose of residing here. This makes him a resident of the state within the meaning of the exemption law.

In the case of *The People v. McClay*, 2 Neb., 9, Lake, J., in delivering the opinion of the court, says: "The relator is a resident of the state, and the head of a family consisting of a wife and several children. He has neither lands, town lots, nor houses subject to exemption under the laws of Nebraska. He is therefore entitled to the benefits secured by section 521 of the code of civil procedure, viz.: to have exempt from forced sale on execution the sum of five hundred dollars in personal property. These benefits are secured to him, not because of the residence of his family, but his own. They attach to him in his own right as the head of a family actually residing here."

The testimony clearly shows that the defendant is a resident of the state, and the fact that he was temporarily stopping at his father-in-law's is of no consequence, as it does not deprive the debtor of his right to the exemption provided by statute. There is no error in the record, and the judgment is in all things affirmed.

JUDGMENT AFFIRMED.

MARTIN CADY, APPELLANT, v. MONROE E. SMITH, AND ADELBERT J. CRITTENDEN, APPELLEES.

Attachment. An attachment by a non-resident partnership in the firm name is not void. The want of legal capacity to sue must be objected to on that ground, or it will be waived.

APPEAL from Butler county. Tried below before Post, J.

E. R. Dean, for appellant.

Clinton, Hart & Brewer, for appellees.

MAXWELL, J.

This case grew out of the case of *Smith & Crittenden v. Steele*, 8 Neb., 115. In that case an action was brought against the Alexis Mercantile Association and the stockholders, the parties being joined in one action. The question whether an action in that form could be maintained was not raised by demurrer, answer, or in any other manner. The plaintiffs in that action recovered judgment for a large amount against not only the corporation but the stockholders thereof, and as the corporate property seems to have been squandered the defendants herein have proceeded against the property of the stockholders. One E. W. Wright was a stockholder in such corporation, and the owner of the south one-half of the south-east one-fourth of sec. 28, in township 16 north, range 1 east, in Butler county, having entered the same as a homestead, the patent therefor being dated November 10th, 1875. In 1877 this land was attached in the suit of *Smith & Crittenden v. Steele et al.*, and afterwards, judgment being rendered in favor of the plaintiffs in that action, the land was ordered to be sold under the attachment. While that suit was pending Wright sold the land in dispute to the plaintiff, who now brings this action to enjoin a sale under the attachment. The action was dismissed in the court below, and the plaintiff now appeals to this court.

Section 136 of the chapter entitled Corporations, Comp. St., 156, provides that: "Every corporation hereafter created shall give notice annually in some newspaper printed in the county or counties in which the business is transacted, and in case there is no newspaper printed therein, then in the nearest paper in the state, of the amount of all the existing debts of the corporation, which notice shall be signed by the president and a majority of

the directors; and if any corporation shall fail to do so, all the stockholders of the corporation shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be contracted before such notice is given."

In *Garrison v. Howe*, 17 N. Y., 458, it was held that to make the parties liable the debt must have been contracted during a default, and that they were not personally liable for a debt contracted before the time fixed by law for the publication of the report.

It appears, however, that the entire amount of this debt was contracted while the corporation was in default in publishing the notice required, and that all the indebtedness except about \$400.00 was contracted after Wright received his patent. As to that portion of the debt which was contracted before the patent was issued the real estate in question is not liable, even if it has been levied upon under the attachment, as such lands are expressly excepted from liability in such cases. As to the remainder of the debts the land is subject, although no more can be held in any case than is sufficient to satisfy the judgment. The liability of a stockholder for debts contracted by the corporation, while it was in default of publication of the annual notice required by law, as to the amount of its debts, is purely statutory, and cannot and should not be extended beyond the strict letter of the statute, as primarily a stockholder is only liable for the amount remaining unpaid upon his stock.

Objection is made that the attachment is in the firm name of Smith & Crittenden, and that firm not being formed to do business in this state it is claimed that the attachment is void.

At common law a suit in the firm name by a company not incorporated, could not be maintained without disclosing the names of the individual partners, because it lacked the certainty deemed to be necessary in judicial

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proceedings. And under the code it should be alleged that the company was formed for the purpose of doing business in this state. But the objection of the plaintiff under the statute is, that Smith & Crittenden could not sue by that name, by reason of either some personal disability, or because they have no title to the character in which they sue. In this case the particular objection is that the action was not brought in the individual names of the partners, but in their firm or business name. This is an objection that can be waived, and will be, unless objection upon that ground is made at the proper time. And after judgment it is too late to make such objection available. There is no error in the record, and the judgment of the court below is affirmed.

JUDGMENT AFFIRMED.

JAMES H. HARRIS, PLAINTIFF IN ERROR, v. JOHN ROBERTS,
DEFENDANT IN ERROR.

1. **Conveyance of lots for location of railroad depot.** H. and R. being the owners in severalty of a large number of lots in S., which would be greatly enhanced in value by the location of a depot near said lots, entered into a verbal agreement that in case of the location of a depot upon the lots of either, and in case the railroad company demanded a gratuitous conveyance of the same, the other would convey to the party so conveying one-half as many lots as had been conveyed to the railroad company. *Held*, That H., having conveyed the necessary lots for depot grounds in pursuance of the contract, could maintain an action against R. for the value of one-half of the lots conveyed.
2. —: **CONTRACT.** The mere fact, that depot grounds were donated, will not render a contract for the location of the depot void.
3. **Petition held** to state a cause of action.

ERROR to the district court for Seward county. Tried below before Post, J.

12	631
32	263
12	631
50	426
52	368
12	631
57	383
12	631
58	121

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McKillip & Page, and O. P. Mason, for plaintiff in error.

Norval Brothers, for defendant in error.

MAXWELL, J.

This is an action to recover from the defendant the value of eighteen lots conveyed by the plaintiff to the Lincoln and Northwestern Railway for depot grounds in Seward. A demurrer to the petition was sustained in the court below and the action dismissed. The following is a copy of the petition:

"Said plaintiff, James H. Harris, complains of John Roberts, defendant, and alleges that on the 10th day of July, 1879, the Lincoln and Northwestern Railway company, a corporation doing business under the laws of the state of Nebraska, was constructing a line of railway from Lincoln in said state to Columbus in said state, by the way of Seward in said county, and proposed to, and was under obligations to erect and maintain a freight and passenger depot at said city of Seward. Plaintiff further alleges that said plaintiff and said defendant were at that time each the owner of a large number of city lots in the western part of said city, which would be enhanced in value by the location of said depot in the western part of said city. That on said 10th day of July, 1879, said plaintiff and said defendant entered into a verbal agreement to this effect. That if said company located and established its depot in the western part of said city and required and requested the gratuitous conveyance to it of any lots owned by either said plaintiff or defendant, to be used for depot purposes, and said plaintiff would gratuitously convey to said company the lots owned by him, and required by it for such purposes, said defendant would also gratuitously convey to said company the lots owned by him and required for such purposes, and that if the

number of lots so conveyed by said plaintiff to said company exceeded in number the lots so conveyed by said defendant, then and in that case said defendant promised, and agreed to and with said plaintiff, that he would immediately thereafter convey in fee simple to said plaintiff such number of lots situate in the immediate vicinity of the lots so conveyed by said plaintiff as would, taking into account the number of lots which might be conveyed to said company by said defendant, equal in number one-half of the lots so conveyed to said company by both said plaintiff and said defendant. That shortly thereafter said company located and established its depot in the western part of said city, and required and requested of said plaintiff the conveyance to it of 36 lots owned by him, to be used by it for depot purposes, whereupon and in consequence and in consideration of said agreement of July 10th, 1879, between said plaintiff and said defendant, said plaintiff, on the 25th day of July, 1879, gratuitously conveyed said 36 lots to said company, to-wit: The whole of block 51, 59 and 64, in Harris, Moffitt & Roberts addition to the city of Seward, and that no lots were conveyed to said company by said defendant or requested by it of him. That said company has since erected and now maintains a freight and passenger depot in the western part of said city of Seward, and upon the lots so conveyed to it by said plaintiff. That said lots were at the time of such conveyance and now are of the value of \$50.00 each, and that lots in the immediate vicinity thereof then were and now are of the value of \$50.00 each. That defendant is the owner of at least 18 lots in the immediate vicinity of said lots and said depot. That defendant, though often requested, neglects and refuses to convey to said plaintiff said 18 lots, to which he is entitled by virtue of the aforesaid agreement, or to pay to said plaintiff in consideration of the premises the sum of \$900.00, or any sum whatever, and has not done so. Wherefore said

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plaintiff asks judgment against said defendant for the sum of \$900.00 and costs.

The contract set out in the petition amounts to this: The plaintiff and defendant being the owners of a large number of lots in severalty in West Seward, which would be materially enhanced in value by the location of a depot near them, agreed to convey the necessary lots for that purpose gratuitously if so required. In pursuance of that agreement the plaintiff conveyed to the railroad company thirty-six lots, thus materially enhancing the value of the defendant's lots, but he now insists that the contract was void, and refuses to perform the same. He, by his demurrer, admits making the contract, and that he retains the special value added to his lots from the location of the depot and the transfer of the plaintiff's property to secure the same, but pleads the statute of frauds as a protection. This defense would be available in an action for specific performance of the contract, but not for the price of property conveyed to a third person at the request of a promissor. Suppose the contract had been to convey to the defendant, could he after receiving a conveyance defeat the recovery of the consideration by pleading the statute? Where a verbal contract is made for the conveyance of land and the land is conveyed accordingly, the statute is no defense to recover an action to recover the price. *Bracket v. Evans*, 1 Cushing, 79. *Preble v. Baldwin*, 6 Id., 549. *Linscott v. McIntire*, 15 Me., 201. *Thayer v. Viles*, 23 Vt., 494. *Morgan v. Bitzenberger*, 3 Gill, 850. *Thomas v. Dickson*, 14 Barb., 90. *Gillespie v. Bartle*, 15 Ala., 276. 3 Parsons on Contr., 35. And it seems to make no difference whether the land is conveyed to the person making the promise, or at his request to some one else.

But it is said that the contract is against public policy and void because it tends to make the officers of the railroad company disregard the rights of the public and

of the company. Whatever the facts may be, there is nothing stated in the petition from which it may be inferred that the rights of either the public or the railroad company have been disregarded. For aught that appears the depot is so situated as best to accommodate the public, and the mere fact that the lots were donated is not sufficient of itself to taint the transaction as being against public policy.

In the case of *St. J. & D. C. R. R. Co. v. Ryan*, 11 Kansas, 602, the company had received a conveyance "upon the express conditions following: Said railroad shall, immediately on the completion of their railroad through said lands establish a depot for freight and passengers on said lands and shall keep and maintain the same for all time; and shall not at any time have or use any other depot within three miles of said depot." The court say (page 608): "Is a contract not to build or use a depot within certain limits a valid and binding contract? Railroad companies are private corporations; yet they are declared to be quasi public agencies, and their roads to subserve to a certain extent public purposes, so much so that the public may be taxed to aid in their construction. *Leavenworth Co. v. Miller*, 7 Kas., 479. It would seem to follow that the public has a right to say that they shall not be permitted, though private corporations, to make any contract which would prevent them from accommodating the public in the matter of transportation and travel." In that case it will be observed that the contract was not to build a depot within certain limits.

In *Fuller v. Dame*, 18 Pick., 472, Chief Justice Shaw, in delivering the opinion of the court, says: "It is obnoxious that if one large landholder may make a valid conditional promise to pay a large sum of money to a stockholder, or influential citizen, on condition that a work of great public improvement may be so fixed as to enhance the value of his estate, all other great landholders may

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make like promises, or similar conditions, and great public works which should be conducted with a view to the public interest and to the just rights of those who make advances for the public benefit, would be in danger of being overlooked and sacrificed in a necessary conflict of separate local and private interests." And a note given to a stockholder in the nature of a bribe was declared void. We fully approve of that decision, and if it should appear that the lots in question were conveyed for the purpose of bribing the railroad company there can be no recovery in the action. But this purpose will not be presumed, and if such was the object of the conveyance the facts can be set up in the answer. It is said that the petition is defective by reason of the failure to allege that the railroad company required the conveyance to be made gratuitously. The allegations of the petition are in substance that the company required the plaintiff to convey the lots described, and that thereupon, in pursuance of the contract, he conveyed the same gratuitously. The statement is not as definite as could be desired, but under the liberal rules of construction established by the code it may be inferred that he was required to convey the lots gratuitously. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

LAKE, CH. J, dissenting.

I fully concur in the foregoing opinion as to the first and main proposition discussed therein, but dissent from the last. I do not think the petition states a cause of action for want of an averment that the railroad company required a "gratuitous" conveyance of the lots by the plaintiff. This fact is not properly inferable from anything that is alleged.

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GILBERT L. LAWS, PLAINTIFF IN ERROR, v. HARLAN COUNTY
AND JOHN S. DAVID, DEFENDANTS IN ERROR.

Counties: EXAMINATION OF TREASURER'S ACCOUNTS. County commissioners have authority under section 160 of the revenue law of 1879 to employ a competent person at a reasonable compensation to examine the accounts of the county treasurer when in their opinion it is necessary to do so. And where such appointment has been made, and the services rendered, necessity for the appointment will be presumed.

ERROR to the district court for Harlan county. Tried below before GASLIN, J.

Laird & Smith, and *P. J. Dempster*, for plaintiff in error.

J. M. Hiatt, for defendant in error.

MAXWELL, J.

In September, 1880, the board of county commissioners of Harlan county employed the plaintiff as an expert to examine the accounts of the treasurer of said county. The compensation to be paid the plaintiff for said services was fixed at \$3.00 per day for the time actually employed. The plaintiff performed the services agreed upon, and made a report of the condition of the treasurer's accounts to the county commissioners of said county, and presented a claim for 80 days services at \$3.00 per day. This claim, amounting to \$240.00, the commissioners allowed, whereupon, one John F. David, a tax payer of said county, appealed to the district court. A demurrer to the plaintiff's petition was sustained in the district court and the action dismissed. The plaintiff brings the cause into this court by petition in error. The question to be determined is the authority of the commissioners to employ an expert for the purpose stated.

Sec. 155 of the revenue law of 1879 provides that: "On or before the first day in October, annually, and at such

other times as the county board may direct, the county treasurer shall make out and file with the county clerk a statement in writing, setting forth in detail the name of each person charged with personal property tax which he and other collectors have been unable to collect, by reason of the removal or insolvency of the person charged with such tax, the value of the property and the amount of tax, the cause of inability to collect such tax, in each separate case, in a column provided in the list for that purpose. Said treasurer shall, at the same time, make out and file with the county clerk a similar detailed list of errors in assessment of real estate, and errors in footing of tax books, giving in each case a description of the property, the valuation and amount of the several taxes and special assessments, and cause of error. The truth of the statement contained in such lists shall be verified by affidavit of the county treasurer."

Sec. 156 provides that: "If any lands or lots shall be delinquent for taxes or special assessments, the treasurer shall be entitled to a credit in his final settlement for the amount of the several taxes and special assessments thereon, the county to allow the amount of printers' fees thereon, and be entitled to said fees so allowed when collected: *Provided*, that the county treasurer shall not be entitled to credit for delinquent personal property until he has filed with the clerk an affidavit that he has been unable to collect the tax due by reason of a want of personal property of the owner thereof, and that to the best of his knowledge and belief no personal property of any such owner is in the county. If the county board be in session on the first of October, it shall settle with and allow the county treasurer credit for such allowance as he may be legally entitled to."

Sec. 158 provides that: "If there be no session of the county board held at the proper time for settling and adjusting the accounts of the county treasurer, it shall be

the duty of the treasurer to file the lists with the county clerk, who shall examine said lists and correct the same, if necessary, in like manner as said board is required to do. Said county clerk shall make an accurate computation of the value of the property, and the amount of the delinquent tax and special assessments returned, for which the collector is entitled to credit."

Sec. 160 provides that: "The auditor and other proper authorities or persons shall, in their final settlements with the treasurer, allow him credit for the amount so certified: *Provided*, That if the auditor or other proper authorities or persons shall have reason to believe that the amount stated in said certificate is not correct, or that the allowance was illegally made, he or they shall return the same for correction; and when the same shall appear to be necessary, in the opinion of the auditor or such other proper authorities or persons, he or they shall designate and appoint some competent person to examine the treasurer's books and settlement, and the person so designated and appointed shall have access to the treasurer's books and papers, appertaining to such treasurer's office or settlement, for the purpose of making such examination."

The authority of the commissioners to employ an expert to examine the accounts of the county treasurer is here expressly given. But it is said that if the power is conceded still there is no allegation in the petition that in the opinion of the commissioners it was necessary to employ an expert to examine the treasurer's account. The principle is well settled that the officers of a municipal or *quasi* corporation cannot bind the corporation by any contract which is beyond the scope of its powers. The reason is, the inhabitants are the incorporators and the officers mere agents, whose duties are prescribed by statute, and whose acts to be valid must be within the scope of their authority. But where the power is ex-

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pressly conferred and has been exercised, as in this case, it is certainly sufficient, *prima facie* at least, to show that, in the opinion of such officers, it was necessary to employ an expert to examine the treasurer's books, by the employment of such expert,—in other words the fact that they employed an expert for that purpose, shows that in their opinion it was necessary to appoint a competent person to examine the treasurer's books.

In the case at bar the commissioners had authority to employ the relator and pay him a reasonable compensation therefor; the services have been performed and accepted by the commissioners, and the plaintiff is entitled to be paid for the same. The judgment of the district court is reversed and the cause remanded.

COBB, J., concurs.

REVERSED AND REMANDED.

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